

**EDGE HILL UNIVERSITY**

**PHD THESIS**

**THE APPLICATION OF EU COMPETITION LAW TO SPORT**

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## **ABSTRACT**

The thesis has looked at the application of competition law of the European Union to sport. The main objective of the thesis is to understand whether the European institutions have adopted a sport-specific approach when applying competition law, and to identify problems connected to it.

Sport presents a number of characteristics that differentiates it from any other industry. It is an area where private and public interests arise and demand protection. These range from private economic interests, to the protection of cultural aspects, health and well-being, and employment.

The European Union has moved from an approach according to which sporting rules were not falling under EU law, to one where any sporting rule is capable of having economic effects and could therefore be assessed. In parallel, Sport Governing Bodies have stopped rejecting the intrusion of EU institutions in sport, and have accepted that the role of the authorities could be channelled to guarantee an area of autonomy.

The thesis provides an original contribution to the body of knowledge in assessing the intensity of the economic analysis adopted by the EU institutions when examining conduct of Sports Governing Bodies. This aspect is particularly connected to the specific characteristics of sport, and of the sporting market.

The research suggests to adopt a system of governance that is more collaborative and inclusive, and that is capable of representing the needs and protect the interest of all the industry stakeholders. This would require a greater involvement of the stakeholders in the rule setting and enforcement procedure, in order to channel the expertise of Governing Bodies and restrict the tendency to abuse of their regulatory powers.

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## INTRODUCTION

### 1. General Introduction; 2. Questions; 3. Methodology; 4 Structure of the thesis

#### 1. General Introduction

The research presented in this thesis focuses on one of the most important areas of modern society. Sport has a phenomenal ability to attract interests and passions, to boost them and exploit them. Sport is capable of educating people and facilitate their inclusion into a society. While participation is one of the idealistic messages of sport and Olympism,<sup>1</sup> the commercialisation and consequent professionalisation have drastically changed the attitude of fans, athletes, Governing Bodies and Authorities towards sport.

This study focuses on an area where EU Institutions, Member States, Sports Governing Bodies, clubs, and athletes all have an interest at stake. In particular, Member States tend to protect their sovereignty in regulating the sporting sector. Indeed, this is a sensitive area, where aspects related to economics, culture, education, and national traditions overlap.<sup>2</sup> This resistance affects the role and the abilities of the EU institutions: the Commission has the main role in applying EU competition law, but the Council represents the interests of the Governments of Member States, while the Parliament has to protect the interests of the citizens.<sup>3</sup>

In this limbo, Sports Governing Bodies have been very effective in their lobbying efforts. In the history of the relationship between Sports Governing Bodies (SGBs) and EU institutions, the former were starting from requesting a total exemption from EU law and, in particular, competition law. The development of sports related case law and decision practice of the EU institutions have convinced SGBs to move towards a

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<sup>1</sup> The Olympic Charter adopted by the International Olympic Committee states that ‘*Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in effort, the educational value of good example and respect for universal fundamental and ethical principles.*’ See Fundamental Principles of Olympism, Olympic Charter, 2016 version, p.11.

<sup>2</sup> See Geeraert, A. (2016) *The EU in International Sports Governance, A Principal-Agent Perspective on EU Control of FIFA and UEFA*, Palgrave Macmillan UK, p. 142.

<sup>3</sup> See Craig, P. P. & De Búrca, G. (2015) *EU law: text, cases, and materials*. Oxford: Oxford University Press; 6th Ed., pp. 33 *et seq.*

position that accepts the competence of the Union. Through dialogue, this approach endeavours to guarantee an area of autonomy for sports governing bodies, to limit the exercise of the EU competence, and ultimately decreasing the likelihood of EU sanctions.<sup>4</sup>

The EU institutions have recognised the role of Governing Bodies as private regulators of the sporting sector. Indeed, their expertise make them best suited to engage in a dialogue with the Commission and promote the autonomy of sport and its specific nature.<sup>5</sup> In this context, however, the EU institutions have always maintained the need for a case-by-case analysis of the conduct of sporting entities and their compliance with EU competition law.<sup>6</sup> This approach has neither increased the certainty in the area, nor it has contributed to reducing the number of complaints.

The general aim of this thesis is to understand and analyse the relationship between the European sport system and EU competition law. This will require the discussion of aspects related to the governance system in sport. In particular, it is submitted that a vertical system of rule setting and enforcement may have to be replaced by a horizontal and more cooperative system, whereby all the industry stakeholders can find greater representation.

## **2. Fundamental Questions**

In light of the general objective stated above, the research has sought to answer three fundamental questions.

Does sport have specific features that require a different application of the law? Far from relying on a mere assumption that sport is special, the thesis seeks to undertake a systematic review of the characteristics of sport, in relation to the product market, the sport market and the labour market. By identifying the characteristics of the sport

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<sup>4</sup> See Garcia, B. and Weatherill, S. (2012) *Engaging with the EU in order to minimise its impact: sport and negotiation of the Treaty of Lisbon*. Journal of European Public Policy, 19 (2), pp. 238 – 256

<sup>5</sup> See Geeraert, A. (2016) *The EU in International Sports Governance, A Principal-Agent Perspective on EU Control of FIFA and UEFA*, Palgrave Macmillan UK, p. 144, and European Commission: C (2014) 7378 final, Commission Decision of 14.10.2014 adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA).

<sup>6</sup> See European Commission, *White Paper on Sport*, COM (2007) 391 Final, at para. 4.1

system and assess their weight, the research aims at understanding whether their relevance is great enough to require the EU institutions to exempt sport or to grant a different treatment to the sector when applying competition law.

Once these characteristics have been depicted, it will be possible to move to the second main question: is there a sport-specific approach applied by the European institutions in relation to sport? In order to provide a comprehensive analysis, the thesis will firstly discuss which are the goals pursued by competition law, and whether there are legitimate objectives that may outweigh the pursuit of economic efficiency. The research will therefore seek to understand what is the intensity of the economic analysis applied by the EU institutions in assessing restrictive conduct on the market. The rules of the sporting industry will then be categorised on the basis of the objectives pursued and the reasons put forward by the governing bodies to justify their adoption. While it is accepted that the general approach is a case-by-case analysis, the thesis will seek to assess whether the rules of the sport system are capable of pursuing legitimate objectives. It will therefore be important to analyse the approach of the EU institutions in relation to the different type of rules and discuss whether some justifications have been more easily accepted than others.

The third question that the thesis aims to answer is related to the impact of Article 165 of the Treaty on the Functioning of European Union (TFEU) on the application of competition law to sport. With this provision, sport was for the first time mentioned in EU primary legislation, granting the EU a legislative competence in the area. The thesis will consider if Article 165 TFEU has had any impact on case law and decision-practice of the EU institutions. Assessing the relevance of this provision will allow to discuss what would be its likely effect in the future as well.

### **3. Methodology**

In order to answer the fundamental questions and provide an original contribution to the body of knowledge, this research has mainly employed a black letter approach.<sup>7</sup> A

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<sup>7</sup> See Salter, M, & Mason, J. (2007), *Writing Law Dissertations: An Introduction And Guide To The Conduct Of Legal Research*: Harlow: Pearson.

black letter approach is a method of research that aims at providing a systematic overview of the rules governing a specific legal category, by analysing the relationship between rules, explaining areas of difficulty and predicting future developments.<sup>8</sup>

This methodology consists of a critical legal analysis of relevant legislation, including European Treaties, policy measures, case law and decision-practice concerning the area under study. Finally, the body of materials consulted includes also reports from relevant stakeholders and relevant academic literature, which have been used to interpret the other sources mentioned. The research therefore uses a number of primary and secondary sources, which have been collected mainly from libraries and official websites of institutions and Governing Bodies.

The research has implemented deductive reasoning, which applies the set of given rules to factual scenarios discussed in the thesis. It has also adopted inductive reasoning, whereby it has used specific cases to draw general rules.<sup>9</sup> And finally analogical reasoning, which applies the principles drawn from a set of cases to another set of events.<sup>10</sup> Through these reasonings, the information collected have been systematically presented and analysed in connection with the fundamental questions that underlie the thesis.

Furthermore, the thesis has adopted an interdisciplinary approach in relation to some aspects. Indeed, sport has a number of different facets, and in order to discuss the subject in a comprehensive manner, the research should take into account the economic aspects, the societal and the cultural aspects of sport. The research will assess how these aspects have influenced the setting of rules and their enforcement.<sup>11</sup>

#### **4. Structure of the Thesis**

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<sup>8</sup> See Hutchinson, T. and Duncan, N. (2012), *Defining and describing what we do: Doctrinal Legal Research*, Deakin Law Review, 17, 1.

<sup>9</sup> Chynoweth, P. (2008) 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment*, Wiley-Blackwell, p. 37.

<sup>10</sup> See Farrar, J.H. (2010), *Legal Reasoning*, Thomson Reuters, p. 92

<sup>11</sup> Chynoweth, P. (2008) 'Legal Research' in Andrew Knight and Les Ruddock (eds), *Advanced Research Methods in the Built Environment*, Wiley-Blackwell, p. 30



The thesis does not present a literature review as a distinct section, but the literature consulted is discussed throughout the entire project to draw conclusion and identify common trends, and gaps.

The first chapter of the thesis looks at the rules of the market within the European Union. This section aims at depicting the framework into which the research will develop, by identifying the rules of EU competition law that may apply to sport. The chapter therefore provides the definitions of the terminology that will be subsequently used. It also discusses some aspects that are of particular relevance in the context of the remaining parts of the research. Indeed, the chapter intends to identify the objectives of competition law and the interests it is set to protect.

The second chapter presents a categorisation of the sporting rules on the basis of their objectives and the justifications put forward by the Governing Bodies. It further discusses the specific characteristics that differentiate sport from other industries, in light of the product market and the labour market. The chapter finally offers an overview of the development of the EU sports policy and sports law.

The third chapter of the thesis discusses the first two categories of sporting rules, namely integrity rules and regulatory rules. This section seeks to identify whether the EU institutions have adopted a common approach in relation to the two categories. It will be shown how rules and conduct that aim at guaranteeing the integrity of the competition are likely to be exempted from a strict application of competition law. Furthermore, Governing Bodies may pursue objectives of public interest when they set and implement integrity rules, but also regulatory rules. Indeed, the need for a structured organisation of competition, to safeguard the safety of participants and fans and the fairness of the competition, represents one of the fundamental characteristic of the industry.

Chapter four discusses the application of EU competition law in the area of the sporting labour market. This section identifies a number of rules and conduct that affect the sporting labour market and are likely to breach competition law. The specific characteristics of the sporting industry affect the features of the labour market, and the setting of rules that are believed to be necessary to guarantee the protection of the

above mentioned features. In this regard, it is submitted that it should be made greater use of Social Dialogue, as a way to include interested stakeholders in the setting of the rules that directly affect their interest. Social Dialogue constitutes a powerful instrument of control of rules and conduct, and may lead to bargaining agreements that will escape the application of competition law.

Chapter five provides an analysis of one of the most profitable commercial areas in the sporting industry. This section discusses the commercialisation of sport broadcasting rights, its features and its legality. This area is particularly delicate, as the analysis is affected by the commercial goals pursued by Governing Bodies and professional sport clubs, but also from a number of other considerations. Indeed, sporting events may have a significant cultural importance for the citizens and for the community. Therefore, the approach taken by Governing Bodies and EU institutions has to be flexible enough to balance the requirement for conduct that produces efficiency on the market, with the need to guarantee consumers and citizens the possibility to see events of cultural importance.

The cultural and political relevance of sport is also one of the underlying themes of chapter six. This section looks at the application of State aid rules to the sporting industry. The chapter examines two main categories of measures: first, the chapter discusses the granting of funding for the construction or renovation of sporting and multifunctional structure, that are assumed to provide benefits to the community at large. Secondly, the focus will be placed on the direct granting of measures to professional sport clubs. The two categories present significant differences, but the cultural importance of sport for local communities is relevant in relation to both of them. Moreover, the chapter will discuss the application of the private economic operator test to State aid measures granted to the sporting industry. According to this test, the conduct of public entities on the market is not relevant if a private operator would have acted in the same way. The chapter will seek to assess whether and to what extent the characteristics of the market are taken into account when this test is applied to sport-related cases.

The seventh chapter seeks to draw conclusions from the analysis undertaken in the previous sections. It therefore focuses on the lack of economic analysis that has been highlighted in the decision practice of the EU Commission in sports-related cases. Subsequently, the chapter presents the outcome of the analysis in relation to the different categories of sporting rules. For each of them, the chapter seeks to identify the effectiveness of the justification put forward by Governing Bodies, and the level of engagement of the different stakeholders in the industry. Indeed, the chapter aims at demonstrating the need for a switch from a vertical model of governance to a horizontal one, through greater use of cooperative instruments, such as Social Dialogue. This means a greater involvement of the stakeholders in the setting and enforcing rules, that would be more easily accepted by the system as legitimate, and therefore less likely to be challenged.

## CHAPTER ONE: EU Competition Law – Market Value

**1. Introduction; 2. The European Union; 3. Principles of competition law; 3.1 The Institutions; 3.2 The Modernisation; 4. The application of the rules of competition law in the EU; 4.1 The definition of undertaking; 4.2 The effects on trade between Member States; 4.3 The Relevant Market; 5. Restrictions under Article 101 TFEU. Rules and Derogations; 5.1 Article 101(3); 5.1.1 *Benefit of Consumers*; 5.1.2 *Economic Efficiencies*; 6. Abuse of Dominant Position under Article 102 TFEU; 7. The role of the State on the Market; 7.1 Article 106 TFEU; 7.2 Article 107 TFEU; 7.2.1 *The Market Private Operator Principle*; 8. Conclusion.**

### **1. Introduction**

This first chapter will present the rules of EU Competition Law, and discuss those that may be relevant for the sporting system. A proper analysis of the theme of the application of competition law to sport cannot disregard an excursus on the general framework of competition law within the European Union. To better tackle the questions that will be presented further on, the primary task is to define the terminology that will be used and the scope of the provisions of competition law in general terms, so to understand the context in which the research will take place. This section of the study will thus provide an analysis of the norms in force within the European Union in regard to competition within the internal market and the developments that might affect the matter in relation to sport.

The objective of this chapter is to establish the Constitutional foundation of EU competition law. This comprises the study of legislative norms, soft-law measures, decisions and case law of the European institutions that inform the application of competition law on normal market conduct. This discussion is relevant in the context of the thesis, as sport may have specific characteristics that differentiate it from other sectors, and the conduct of the market players in sport may pursue aims that are not

merely economic. Hence, this section, alongside the following chapter, will try to establish what is the relationship between sport and competition law, and whether the characteristics of sport are so important that specific consideration by the institutions is required.

The European Union was created by the Maastricht Treaty<sup>12</sup> but it is the resulting development of the original European Community, created through the Treaty of Rome.<sup>13</sup> The primary political project and goal of the Community, which was the establishment of peaceful relationships over the commercialization of scarce resources, had to be pursued essentially through economic measures.<sup>14</sup> In particular, starting from the Single European Act,<sup>15</sup> the aim was perfected with the constitution of the internal market, which would have amounted to an area where direct and indirect barriers to trade between Member States had to be removed, and a common import and export policy related to commercial transactions occurring with third countries was to be adopted.<sup>16</sup> Other elements had to form part of the process of the constitution of the internal market, such as the protection against restrictions on the free movement of goods, workers, services and capital. Furthermore, to guarantee the effectiveness of the system, a competition policy was needed to ensure that private operators could not divide the market alongside national barriers. And, finally, the intervention of the State in the economy had to be regulated as well, in order to prevent further distortion of the competition.<sup>17</sup>

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<sup>12</sup> European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht [1992], OJ C 325/5; the most current versions of the Treaty have been enacted in Lisbon in 2007. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01. After the Treaty of Lisbon, the primary source of legislation within the European Union are thus the Consolidated version of the Treaty of the European Union, OJ C 326, [hereinafter TEU] and the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 [hereinafter TFEU].

<sup>13</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>14</sup> See Craig, P. P. & De Búrca, G. (2011) *EU law: text, cases, and materials*. Oxford: Oxford University Press, c2011; 5th Ed.

<sup>15</sup> Single European Act, 1987 O.J. L 169/1, [hereinafter SEA] (amending Treaty Establishing the European Economic Community)

<sup>16</sup> See Judgment of the European Court of Justice in Case 15/81, *Gaston Schul Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR I-1409, para. 33.

<sup>17</sup> See Chalmers, D., Davies, G. & Monti, G. (2014), *European Union law*, Cambridge University Press, Cambridge, United Kingdom, p. 14.

The creation of the common market, in this regard, was not a specific goal to itself, but it constituted a means to achieve the objectives of promoting peace, the values of the European Union and the well-being of its people.<sup>18</sup> In order to guarantee the attainment of such ambitious goals, it became necessary to enact provisions capable of eliminating any unreasonable and not justified distortion of the market within the internal market. The economic integration was therefore pursued through the protection of free movement of persons and capital, and the adoption of the rules of competition law.<sup>19</sup>

## 2. The European Union

The European Union was created through International Treaties, which bound the signatories to transfer a number of areas of State sovereignty to the new born entity.<sup>20</sup> In light of the original status of the Union, its competencies were strictly limited to those areas that the Member States agreed to cede.<sup>21</sup>

This principle of conferral, now set out by Article 5(2) of the Treaty of the European Union (TEU), was meant to guarantee the Member States that some specific areas, considered particularly sensitive, were to be kept under their respective competence. The same Article provides also for the principle of subsidiarity and the principle of proportionality. The first establishes that, in the areas that do not fall within its own exclusive competencies, the Union shall take action only insofar as the objectives cannot be sufficiently achieved by Member States. The principle essentially imposes that matters should be dealt with at the closest level to those affected. Similarly, the

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<sup>18</sup> These were provision inserted in the original Treaties and now they can be found at Article 3 of the TEU. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed, p.34. Indeed, the Community has not only economic objectives but it also pursues social goals. See Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paras. 104 – 105.

<sup>19</sup> See Cruz, J.B. (2002), *Between competition and free movement: the economic constitutional law of the European Community*, Hart, Oxford.

<sup>20</sup> See Borchardt, KD (2010), *The ABC of European Union law*, Publication Office of European Union, Brussels, p.10, and also Bulmer, S. (1993), *The Governance of the European Union: A New Institutional Approach*, Journal of Public Policy, 13, pp 351-380.

<sup>21</sup> This is confirmed in Article 4 TEU, whereby the competences not conferred on the Union remain with the Member States. See Craig, P. P. & De Búrca, G. (2011) *EU law: text, cases, and materials*, Oxford: Oxford University Press, c2011; 5th Ed., p.75.

principle of proportionality contends that the action of the Union should not go beyond what is necessary to achieve the objectives set by the Treaties.

Throughout the years the Union has eroded the areas of exclusive competence of the Member States,<sup>22</sup> by virtue of further agreements signed by the latter, and also in light of the activity of the Court of Justice.<sup>23</sup>

The European Union, after the reform enacted through the Lisbon Treaty, can exercise its competence in various forms, depending on the degree of penetration and harmonisation chosen in relation to the legislation of Member States. Article 2(1) of the TFEU establishes the category of exclusive competence: in the areas subject to this provision, only the Union can legislate and implement binding acts, which will have effects in all the Member States. The consequences of the inclusion of an area in such a category are very severe, since it implies that Member States have no autonomous legislative competence in that relation and they cannot adopt any legally binding act, either legislative or not, unless specifically empowered by the Union.<sup>24</sup> The rules on competition within the internal market are of exclusive competence of the Union. However, whilst the enactment of provisions related to competition is of exclusive competence of the Union, the discipline of the internal market falls into the competencies that have to be shared between the Union and Member States. In this other area, Member States can take action only when the Union has not already exercised its own competence, or in the case it has decided to cease from exercising it. Finally, the Union can also carry out actions to support, coordinate or supplement the action of Member States. This third type of competence is the one that entails the lightest form of penetration and restraint of the sovereignty of the Member States. In these areas, the Union cannot carry out any form of harmonisation.<sup>25</sup> However, the

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<sup>22</sup> For a discussion on the area of sovereignty and policy making within the European Union, see Richardson, J., ed. (2006), *European Union: Power and Policy-Making*, 3<sup>rd</sup> ed, Routledge, Abingdon.

<sup>23</sup> See S R Weatherill, (2011), *'The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court's case law has become a 'drafting guide''*, 12 German Law Journal 827.

<sup>24</sup> Craig, P. P. & De Búrca, G. (2011) *EU law: text, cases, and materials* / Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press, c2011; 5th Ed.

<sup>25</sup> See *idem*. p.85.

institutions may still adopt other forms of binding provisions that, although based on other areas of competence, might still affect this area.<sup>26</sup>

Amongst others, the area of education, culture, vocational training, youth and sport is subject to this form of competence. The inclusion of sport under the area of competencies of the European Union was formalised for the first time with the Treaty of Lisbon. Article 165 TFEU, in fact, provides for the first time a legal basis for the activity of the European Union in the field of sport. As mentioned before, the real impact of this Article is debatable, since the competence granted to the Union is the weakest possible.<sup>27</sup>

### 3. Principles of Competition Law

Within the framework of the internal market, competition law pursues the objective of protecting and maintaining a fair competitive process.<sup>28</sup> In this perspective, it aims at encouraging an optimal allocation of the resources, industrial efficiency, and technical progress.<sup>29</sup> A highly competitive market, however, should also deliver the best possible outcome to consumers.<sup>30</sup>

Hence, there are a number of different goals and approaches to competition law:<sup>31</sup> on the one hand the aim of competition law could be interpreted as limited to the preservation of fair conditions of competition within the market, therefore pursuing the

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<sup>26</sup> For example, public health falls under this type of competence. The Court of Justice has allowed some form of harmonisation in this sector, justified under the need to regulate the internal market. Consideration related to public health were therefore held to be taken into account in this perspective as from Article 114 TFEU. See S R Weatherill, *'The limits of legislative harmonisation ten years after Tobacco Advertising: how the Court's case law has become a 'drafting guide''* (2011), 12, German Law Journal, 827. See also Case C-376/98, *Germany v. Parliament and Council* [2000] E.C.R. I-8419.

<sup>27</sup> See *infra* §2 for a discussion about EU sport policy and the role of Article 165 TFEU.

<sup>28</sup> Protocol 27 annexed to the TFEU clarifies that market integration constitutes the specific aim of competition law. See Lianos, I. (2012) *Competition law in the European Union after the Treaty of Lisbon*, in *The European Union after the Treaty of Lisbon*, Ed. By Ashiagbor, D. Countouris, N., Lianos, I., Cambridge University Press, pp. 252 – 283.

<sup>29</sup> See the XXIXth Report on Competition Policy of the European Commission [1999], Sec (2000) 720 Final, p. 19.

<sup>30</sup> See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 33.

<sup>31</sup> See Odudu, O. (2010) *The Wider Concerns of Competition Law*, Oxford Journal of Legal Studies, vol. 30, no. 3, pp. 599-613.



objective of consumer welfare.<sup>32</sup> On the other hand, it is the prevention of consumer harm that should be seen as one of the milestones of competition law: hence, it should focus more on the individual needs of consumers, rather than the general conditions of the market.<sup>33</sup> Finally, one objective that might be pursued and that is not fully included in the previous two is the protection of the freedom to compete in the market.<sup>34</sup>

It is therefore apparent that the objectives of competition law can be manifold; this, however, means that they might be pursued in a number of ways and that different factors might influence the process.<sup>35</sup> One of the main questions is thus whether considerations that are not strictly economic should be taken into account within the application of competition law.<sup>36</sup>

The remaining part of the chapter will present a discussion on the individual provisions of competition law,<sup>37</sup> and the scope and objectives of each of them will be discussed through relevant literature and case law.

### 3.1 The Institutions

Having briefly introduced the main goals of competition law, it is necessary to provide an overview of the institutions that are mandated to apply and enforce EU competition law.

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<sup>32</sup> See *idem*, para. 13, and Marsden, P. and Whelan, P. (2006) 'Consumer detriment' and its application in EC and UK competition law, 27(10) European Competition Law Review, 569 - 585.

<sup>33</sup> For a discussion about the notion of consumer harm, see Lianos, I. (2013), *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Working Paper Series 3/2013. Available at SSRN: <http://ssrn.com/abstract=2235875> Accessed on 21, Nov. 2014.

<sup>34</sup> See Akman, P. (2014) *The role of 'freedom' in EU Competition Law*, Journal of Legal Studies, Vol. 34 No. 2, pp. 183–213.

<sup>35</sup> See Townley, C., (2011), *Which Goals Count in Article 101 TFEU? Public Policy and its Discontents*, European Competition Law Review. Available at SSRN: <http://ssrn.com/abstract=1894837>, and Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy? Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>36</sup> And thus, Article 7 TFEU states that the Union shall take account of all its objectives when implementing its policies and activities; similarly, horizontal provisions might be found in the Treaties that mandate the institutions to take in consideration some particular factors in any of the activities of the EU. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 49, and Townley, C. (2008) *Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer*. Cambridge Yearbook of European Legal Studies, Vol. 10, p. 345, 2008. Available at SSRN: <http://ssrn.com/abstract=1358646>

<sup>37</sup> See *supra*, § 5 – 7.

In the areas where the European Union has exclusive competence, a fundamental role is held by the Commission. This institution has the task of enforcing competition law, and it has also been granted special powers of investigation and sanction in relation to conduct that might infringe European Union Law.<sup>38</sup> The power to investigate suspected infringement of EU competition law may also culminate in a Decision ordering an end to the breach, or sanctioning the undertaking involved with a fine, under the scope of Council Regulation 1/2003.<sup>39</sup> In this context, the Commission may act on its own initiative or following an instigation of a Member State, or after a complaint of a legal or natural person whose legitimate interest has been affected by the challenged conduct.<sup>40</sup> The Commission might impose structural or behavioural modification to the undertakings involved in the conduct. It can also issue a Decision exempting a specific arrangement when it does not restrict competition, or the restriction itself is justified, or when such an exemption is considered to be in the public interest.<sup>41</sup> Under article 9 of the Regulation, the undertakings themselves may offer specific commitments in order to eliminate antitrust concerns, and the Commission can issue a Decision to make them binding if they are deemed satisfactory.<sup>42</sup> This allows the Commission to conclude an investigation and resolve the case without having to establish whether an infringement has in fact occurred, and which are the grounds for a possible exemption.<sup>43</sup>

Furthermore, the Commission may also adopt other legislative measures: the Council has empowered the Commission to adopt Regulations granting block exemptions, through which some specific types of agreements are excluded from the scope of

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<sup>38</sup> See Article 17 of the TEU, and Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed, p. 102.

<sup>39</sup> See Article 18 and 20 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1. Article 18 grants the Commission the power to request information to the undertakings involved in an alleged breach, while Article 20 gives the Commission the power to carry out inspections at the premises of the undertakings involved.

<sup>40</sup> See para 33 *et seq.* of the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004.

<sup>41</sup> Article 7, of the Council Regulation (EC) No 1/2003.

<sup>42</sup> The Commission has used this approach in relation to infringements under both Article 101, see *infra* the *Bundesliga* and *Premier League* Cases, and 102 TFEU, see Cases No COMP/39.65, *Reuters Instrument Codes* and No COMP/39.230, *Rio Tinto Alcan*.

<sup>43</sup> Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

application of Article 101(1) TFEU.<sup>44</sup> The Commission can finally adopt Communications and Notices to clarify the way it intends to deal with certain matters. These measures, which usually fall under the category of ‘soft law’,<sup>45</sup> do not have legislative force, and they cannot bind the Court of Justice.<sup>46</sup> However, they might constitute useful guidance for the undertakings, and the Commission itself cannot depart from them in an individual case without breaching the general principles of law,<sup>47</sup> such as equal treatment and legitimate expectations.<sup>48</sup>

The way the Commission decides to act in relation to conduct restricting the competition on the market may therefore range from a strict application of the rules, with no possible flexibility, to a structured dialogue with private regulators and actors. In particular, when the Commission does not get to the point of bringing a case before the Court of Justice, it liaises with private operators in a number of ways. Through the opening of an investigation, negotiations and commitments on the part of the undertakings, but also through the issuing of guidelines and soft law measures the institutions aim to steer the conduct of the private operators towards forms of better governance.<sup>49</sup>

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<sup>44</sup> The authority for adopting block exemption regulations stems from Article 103 TFEU. This provision allows the Commission to exercise the power on the basis of the experience gained in the application of EU law to this specific sector. See Marco Colino, S. (2011) *Competition Law of the EU and UK*, Oxford University Press, p. 206, and Lianos, I. (2012) *Competition law in the European Union after the Treaty of Lisbon*, in *The European Union after the Treaty of Lisbon*, Ed. By Ashiagbor, D. Countouris, N., Lianos, I., Cambridge University Press, pp. 252 – 283.

<sup>45</sup> See Senden, L. (2004), *Soft Law in European Community Law*, Hart Publishing.

<sup>46</sup> See Joined Cases 501/06 P, C-513/06 P, C-515/06 and C-519/06 P, *GlaxoSmithKline* [2009] ECR I-9291, para. 63. However, the CJEU has long affirmed that EU and National Courts have to take soft law measures into account when deciding cases before them. See Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles* [1989] ECR I-4407, para. 18.

<sup>47</sup> The General Principles of Law are included in the hierarchy of norms of EU law.

<sup>48</sup> Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed, p.118.

<sup>49</sup> This form of dialogue between the Commission and private operators is the preferred one in the sporting sector. See Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37

On the other hand, the power held by the Court of Justice of the European Union<sup>50</sup> has to be considered as well. The role of the CJEU is to ensure that in the interpretation and application of the Treaties the law is observed.<sup>51</sup>

The Court, however, may address a question in the area of competition law only in two specific instances. First, the Court might be called upon to review the legality of acts adopted by EU Institutions,<sup>52</sup> thereby including the decisions of the Commission in relation to the competition in the internal market.<sup>53</sup> Challenges will normally be heard before the General Court in the first instance, and appeals on a point of law can be brought to the Court of Justice.<sup>54</sup> Secondly, a national court might seek a preliminary ruling on the interpretation of an EU norm that has to be applied in the case at hand.<sup>55</sup> The Court of Justice will thus give a ruling on a point of EU law, necessary to interpret a provision of domestic law in a case before the national court. However, the Court will refuse to rule on a reference where this is not made by a Court or Tribunal.<sup>56</sup> Moreover, the CJEU cannot act on its own initiative to clarify a point of EU law that might have been misinterpreted or misapplied by the Commission.

The same principles apply also for rules of national competition law, which are usually drafted to mirror the respective EU rules, and have to be interpreted in line with them.<sup>57</sup>

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<sup>50</sup> The Court of Justice of the European Union, also CJEU hereinafter, is formed by the General Court (GC), court of first instance in some matters, and the Court of Justice (CJ). The CJ is assisted by a number of Advocates General, whose role is to make impartial and independent submission on any case brought before the Court. These submissions are not binding for the Court. See Article 252 TFEU.

<sup>51</sup> See Article 19 TEU.

<sup>52</sup> See Article 263 TFEU.

<sup>53</sup> And in relation to infringement procedures under Article 258 TFEU. The CJ has also unlimited jurisdiction to review the penalties imposed by the Commission on the basis of Regulations enacted by the Council, thereby including Regulation 1/2003.

<sup>54</sup> See Article 56 of the Protocol (No 3) on the Statute of the Court of Justice of the European Union, OJ C 83/210.

<sup>55</sup> Article 267 TFEU. Final Courts are instead under an obligation to refer the decision on the interpretation of the provision to the Court of Justice. See Craig, P. P. & De Búrca, G. (2011) *EU law: text, cases, and materials* / Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press, c2011; 5th ed, Chap. 13.

<sup>56</sup> And therefore, National Competition Authorities may in principle not refer the question to the CJ. See Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline* [2005] ECR I-4609, para. 29. A reference may be made only by a body established by law, which is independent, permanent and whose jurisdiction is compulsory.

<sup>57</sup> Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed.

### 3.2 The Modernisation

In the context of a discussion on the application of competition law, it is important to mention the process of modernisation.<sup>58</sup> Regulation 1/2003<sup>59</sup> has involved National authorities in the enforcement of EU competition law.<sup>60</sup> National courts and competition authorities of Member States must now apply, alongside the provisions of national law, also EU competition law in cases regarding agreements (Article 101 TFEU), or abuse of dominant position (Article 102 TFEU) that occur within their territory, and which may affect trades between Member States.<sup>61</sup> National Authorities form with the Commission the European Competition Network (ECN).<sup>62</sup> In the balance of competencies, a National Competition Authority should take action when the conduct in question has direct effects on its territory, or it originates within its territory, and provided that the NCA is able to gather the evidence required to prove the infringement, bring the infringement to an end and sanction it adequately.<sup>63</sup> Furthermore, when a National Authority is already investigating a specific conduct, the Commission should initiate its procedure only after having consulted the NCA.<sup>64</sup> While

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<sup>58</sup> Regulation 1/2003 is the outcome of a process started in 1999 with the adoption by the Commission of the White Paper on modernisation of the rules implementing Article 101 and 102 of the Treaty [1999] OJ C132/1. The Commission aimed at promoting the decentralisation of enforcement through a network of national Courts and National Competition Authorities.

<sup>59</sup> The Council Regulation (EC) No 1/2003 replaced the previous Regulation 17 on 1 May 2004.

<sup>60</sup> Regulation 1/2003 in effect changed the procedural regime, enabling the Commission to focus on more serious infringement of competition law, rather than dealing with any conduct notified to it. See Whish, R. & Bailey, D. 2012, *Competition law*, 7th edn, Oxford University Press, Oxford, p. 250.

<sup>61</sup> Article 5 Regulation No 1/2003. Moreover, Article 15 provides for a number of different types of cooperation arrangement between the Commission and the National Courts.

<sup>62</sup> It is for the Member States to designate the National Competition Authority (NCA hereinafter) responsible for the application and enforcement of competition law within their respective territory. Member State may decide to allocate different functions to their National administrative and judicial bodies. See Article 35, Regulation 1/2003. The Commission has also issued a Joint Statement to set out the main principles related to the allocation of cases within the Network. See Joint Statement of the Council and the European Commission on the Functioning of the Network of Competition Authorities, 10 December 2002, available at [http://ec.europa.eu/competition/ecn/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/ecn/joint_statement_en.pdf).

<sup>63</sup> See Joint Statement, paras. 11 – 14. The Commission has also issued a Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43, which deals with these matters at para. 8.

<sup>64</sup> See Article 11(6) of Regulation 1/2003. However, where possible, cases should be dealt with by a single authority. Nevertheless, several NCAs might act in parallel. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed, p. 1052.

this thesis will be mainly focus on the public enforcement of EU competition law, the role of national courts is important in relation to private enforcement as well.<sup>65</sup>

The Commission will still be best placed to investigate arrangements that have effects in more than two Member States, or anyway where the interests of the Union so require.<sup>66</sup> Furthermore, the Commission retains a function of control over the action of national authorities:<sup>67</sup> the latter, alongside national courts, cannot take decisions that are contrary to a Decision adopted by the Commission.<sup>68</sup> This provision reflects the pivotal role that the Commission holds in relation to the enforcement of competition law and with regard to the formulation of enforcement norms.<sup>69</sup>

#### **4. The Application of the rules of Competition Law in the EU**

In general terms, it might be said that the law of the European Union is engaged whenever a conduct or an arrangement affects rights protected by the Treaties, provided that its effects are produced within the territory of the Union. The main norms that provide the discipline of competition law within the European Union are Articles 101, 102, and 106 and 107 of the Treaty on the Functioning of the European Union.<sup>70</sup> The first two Articles deal with conduct and arrangements adopted by private undertakings, while the other two aim at regulating and controlling the influence of Member States on the market.

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<sup>65</sup> Any action for damages claims against undertakings that infringe EU competition law has to be brought before National courts. See Chalmers, D., Davies, G. & Monti, G. 2014, *European Union law*, Cambridge University Press, Cambridge, United Kingdom, p.989.

<sup>66</sup> See Joint Statement on the Functioning of the Network of Competition Authorities, para. 19. In particular, only the Commission may adopt a decision finding that there is no infringement of Articles 101 and 102 TFEU. See Rizzuto, F. (2011) *Article 5 of Regulation 1/2003: the limits to national procedural autonomy*, in *European Competition Law Review*, 32 (11). pp. 564-572.

<sup>67</sup> This goes alongside with the power of the Commission to initiate an investigation. Where the Commission decides to do so, the NCA is relieved from its competence to apply Articles 101 and 102. See Article 6 of the Regulation 1/2003, and para. 51 of the Cooperation Notice [2004] OJ C101/43.

<sup>68</sup> See Council Regulation (EC) No 1/2003, Article 16. This can also be considered the expression of the general principle set by Article 4(3) TEU, whereby Member States are under the obligation of ensuring that the national bodies do not hinder the achievement of EU objectives.

<sup>69</sup> In relation to sport, the Commission has maintained that disputes related to sports governance and individual situations can be effectively handled by National Courts. See European Commission, Press Release IP/16/3201 - Antitrust: Commission sends Statement of Objections to International Skating Union on its eligibility rules. Brussels, 27 September 2016.

<sup>70</sup> This will be the numeration that will be used throughout the entire thesis, despite the fact that authorities may refer to the Articles under previous numeration.

These provisions will be applied any time a conduct put in place by an undertaking is capable of affecting the trade between Member States.<sup>71</sup> They may be applied also to conduct put in place by sporting entities as long as they affect competition on the market.

It is necessary to clarify a number of concepts before moving forward. The rules of competition law address behaviours put in place by undertakings that have as their effect or object the restriction of trade between Member States. It will be therefore mandatory to identify when a conduct is capable of producing effects on trade between Member States. Furthermore, it is necessary to provide a definition of the term undertaking, as to clarify which entities will be subject to those provisions and which others may escape from the application of these rules. This is particularly relevant in light of the complexities that will affect the subsequent analyses and in relation to the status and form that sporting bodies might be able to take.

#### **4.1 The notion of Undertaking**

The Court of Justice has given its definition of an undertaking in the *Höfner* case:<sup>72</sup> for the purposes of EU law, the term undertaking encompasses any natural or legal person engaged in any kind of economic or commercial activity in the provision of goods and services, regardless of its status or the way it is financed.<sup>73</sup> The focus should therefore be on the material activity carried out by this entity, consisting in offering goods or services on the market.<sup>74</sup> In this perspective, it is not relevant whether the undertaking carries out its activity in pursuit of profit or otherwise, but simply that the latter is included in the broad category of economic activities.<sup>75</sup>

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<sup>71</sup> The test applied by the Court assesses a specific arrangement ‘*on the basis of indirect, potential or actual effect on the flow of trade between Member States*’. See Case 56/65, *Societe Technique v Maschinbay Ulm*, [1966], ECR 235, para. 7.

<sup>72</sup> Case C-41/90 - *Klaus Höfner and Fritz Elser v Macrotron GmbH*. [1991] ECR I-1979.

<sup>73</sup> *Idem*, para. 21.

<sup>74</sup> See Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7.

<sup>75</sup> See Case 155/73, *Italy v. Sacchi* [1974] ECR 409, and more pertinent to this research, the Decision of the Commission 92/521/EEC Distribution of package tours during the 1990 World Cup, (1992) OJ L326/31. Obudu however points out that, in order to consider an entity an undertaking, the entity in question should be able to offer goods or services on the market, with the potential of making profits from its activity, and

Similarly, the form that such an entity takes is irrelevant in this scenario, as the economic nature of the activity carried out is the only element to be considered. An undertaking can therefore be constituted by an individual carrying out an economic activity on its own;<sup>76</sup> the definition may comprise also a group of entities which effectively functions as a single economic unit.<sup>77</sup> In this respect, parent and subsidiaries companies will form such a unit if the former effectively exercises decisive influence over the conduct of the latter. That is to say, if the controlled company is not able to decide independently its own market conduct but it rather represents an operative branch of the parent company.<sup>78</sup> The relevant point to be addressed is whether two or more separated legal persons behave together as a single unit on the market:<sup>79</sup> agreements and concerted practices that concern merely the allocation of tasks amongst the members of the group will escape from the scrutiny of competition law.<sup>80</sup>

Another distinction has to be made between a private undertaking and an entity performing tasks in the public interest:<sup>81</sup> the function carried out in the particular circumstances will operate as the main factor to differentiate these entities. Even when the entity involved is a public body, its conduct will be relevant when the activity it performs is capable, at least in principle, to be carried on by private undertakings to make profit.<sup>82</sup>

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bearing the risks of the enterprise. See Odudu, O. (2006), *The boundaries of EC competition law: the scope of Article 81*, Oxford University Press, Oxford.

<sup>76</sup> See for example the Case *RAI/UNITEL* [1978] OJ L157/39, but also the *Meca Medina* case, C-519/04 P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-6991, where two professional swimmers were considered undertakings for the purpose of Article 101 TFEU. See *infra*, chap. 3.

<sup>77</sup> Case 170/83, *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR 2999, para. 11.

<sup>78</sup> Case C-172/12 P, *El du Pont de Nemours and Others v Commission* [2013] n.y.p., and Case C-179/12 P, *Dow Chemical v Commission*, [2013] n.y.p. In this scenario parent companies might be held liable for the acts of the subsidiaries, see Case T-314/01, *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v Commission*, [2007] 4 CMLR1, para. 136.

<sup>79</sup> Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 138.

<sup>80</sup> Case 30/87 *Bodson v. Pompes funebres* [1998] ECR 2479, para.19.

<sup>81</sup> Public entities or undertaking providing services of general economic interest are generally not subject to the application of competition law. Article 106 TFEU clearly states that these entities will fall under the scope of the rules of competition law only to the extent that this will not obstruct the performance of such services. See *infra* § 7.1.

<sup>82</sup> See Case C-67/96 *Albany International v Stichting* [1999] ECR I-5751, Opinion of AG Jacobs, para 311. Where a private undertaking would not be able to carry out that activity, there would be no reasons to apply



Since the main criterion to take into consideration for the identification of an undertaking is the nature of its activity, it is possible that an entity might be classified as an undertaking in relation to a number of the activities it carries out, while in other instances its conduct will not be relevant. Therefore, the fact that an undertaking is vested with public powers does not immediately exclude it from the scope of application of competition law, in respect of that set of activities that are economic in nature.<sup>83</sup>

#### **4.2 The effects on trade between Member States**

As stated by the Court of Justice, in the context of an analysis under the lens of competition law, an arrangement will be assessed on the basis of its effects, actual, indirect or potential on the flow of trade between Member States.<sup>84</sup>

The arrangement must have an impact on the flow of goods and services, or other relevant economic activities that involve at least two Member States.<sup>85</sup> In this perspective, however, the notion of trade is not exclusively referred to the exchange of goods and services, but it has to be construed as a wider concept, capable of including different sorts of cross border activities, and thus also the establishment in another Member State.<sup>86</sup>

Furthermore, the cross border effects within the internal market have to be appreciable.<sup>87</sup> It is often assumed that an agreement between entities situated in different Member States will certainly affect intra-member trade. The Courts of the

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the rules of competition law to it. See also Case C- 264/01 *AOK v. Bundesverband and Others* [2004] ECR I-02493, Opinion of AG Jacobs, para. 27.

<sup>83</sup> See Case C-49/07 *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863, para.25.

<sup>84</sup> See Case 56-65 *Société Technique Minière v. Machinenbau* [1966] ECR 235, at p. 249.

<sup>85</sup> Notice of the Commission on the concept of effect on trade between Member States [2004] OJ C101/81, para. 21.

<sup>86</sup> *Idem*, para. 19

<sup>87</sup> The provisions of competition law within the Treaty do not require expressly that the effect of the conduct on the trade between Member States has to be appreciable, but this might be inferred by the case law of the Court of Justice. See Case 22/71, *Béguelin Import Co. v S.A.G.L. Import Export* [1971] ECR 949, para. 16, and Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 180.

European Union, however, have interpreted this condition broadly,<sup>88</sup> to the point that even agreements that are confined to activities that take place only in one Member State might be deemed to fulfil the requirement.<sup>89</sup> An agreement which operates only in one Member State is thus still capable of producing effects on the trade between Member States. National cartels and dominating undertakings are able to divide the common market under national lines, and therefore hinder the ability of undertakings from other Member States of penetrating the market.<sup>90</sup> On the other hand, an arrangement whose effects are limited to the territory of a single country will be subject only to the law of that particular Member State. However, the provisions of competition law of individual Members States often reproduce the rules enacted at EU level.

An arrangement will be capable of affecting trade between Member States where it is possible to foresee with a sufficient degree of probability and on the basis of objective criteria that it can have an influence, direct or indirect, actual or potential on the pattern of trade between Member States in a way that could hinder the attainment of the objectives of the single market.<sup>91</sup> This clearly indicates that agreements concluded between or conduct carried out by undertakings that hold a weak position on the market will not fall under the scope of the EU competition law provisions.<sup>92</sup> Nevertheless, these arrangements are still likely to be assessed under the rules of national competition law of the Member State where they took place.

The appreciability of the restriction has to be evaluated with reference to the position and the importance of the undertaking on the relevant market, thus depending on the

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<sup>88</sup> It is enough that the effect can be foreseen with a sufficient degree of probability. See Case 56-65 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 235, p. 249.

<sup>89</sup> See Notice of the Commission on the concept of effect on trade between Member States [2004] OJ C101/81, para. 77 *et seq.*, and Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>90</sup> See Case 8/72 *Vereeniging van Cementhandelaren v. Commission* [1972] ECR 997, para. 29, and Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 184.

<sup>91</sup> Case 5/69 *Volk v Vervaecke* [1969] ECR 295, p.302.

<sup>92</sup> See Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014], OJ C 291.

circumstances of the case.<sup>93</sup> This assessment can either be made in absolute terms, in relation to the turnover of the undertaking, or in relative terms, identifying the market share in comparison with the competitors on the market.<sup>94</sup> The Commission, however, has set some specific criteria that, where cumulatively satisfied, indicate that trade will not be appreciably affected. This is the case where the aggregate market share of the parties to an agreement does not exceed 5 per cent, and, in case of horizontal agreement, the aggregate annual turnover is not higher than 40 million Euro.<sup>95</sup>

### 4.3 The Relevant Market

The necessary basis for any analysis of conduct under the rules of competition law is the definition of the relevant market in which the conduct itself has to be considered. In order to be able to appreciate the effects and consequences of specific conduct, the relevant market has to be identified, as it is not possible to assess the legitimacy of an arrangement in abstract. Market definition is also considered as a tool to identify and set out the boundaries of competition between firms, and it provides the framework within which the EU Commission will apply competition policy.<sup>96</sup>

A market is defined as consisting of a product, or a group of products, and a clearly identified geographic area in which these are produced, marketed or sold. In order to efficiently evaluate the economic power of the undertakings, the conditions of competition in this market have to be sufficiently homogeneous and companies have to be effectively competing amongst each other.<sup>97</sup> The analysis will therefore have to individuate the main competitors in action and their respective market shares, and identify the related markets that might be affected by the conduct.

The definition of the relevant market implies a thorough analysis of a given economic sector in a specific geographical region, considered at a given time. The aim of defining

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<sup>93</sup> This is an autonomous criterion that has to be assessed separately in each case. See para. 12 of the Commission Notice on the concept of effect on trade between Member States [2004] OJ C101/81.

<sup>94</sup> See *idem*, para. 46 - 47.

<sup>95</sup> See para 50-57 of the Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5.

<sup>96</sup> See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5, para. 2.

<sup>97</sup> Case 27/76, *United Brands v. Commission* [1978] ECR 207, paras 11 and 44.

a relevant market is to identify products and services which the consumers consider as substitutable between each other, to the point that the existence of such a substitute represents a constraint for the supplier of the first product or service.<sup>98</sup> The relevant market would therefore be constituted by products which are interchangeable with each other, but that cannot be substituted by products outside that market. Indeed, the analysis is limited to the participants of a relevant market, and cannot include all the other markets or sectors of the economy that may be affected.<sup>99</sup>

Hence, in this context the main focus should be placed on the substitution factors, which identify whether a particular product might be replaced with a similar one, in the event of a small but significant increase of its price, and effectively satisfy the demands of consumers.<sup>100</sup> These factors will comprise the substitutability of the product on the demand side,<sup>101</sup> that measures whether consumers consider a number of products as substitutes, and the cross elasticity of demand, which is the tendency of consumers to switch to other products.<sup>102</sup> The substitutability of the product might be considered in relation to other products, or to the same type of product manufactured and marketed elsewhere.<sup>103</sup>

Other aspects should be considered as well: the behaviour of an undertaking on a market will also be influenced by the ability of potential competitors of entering into the said market. The supply substitution considers how easy it is for manufacturers to switch to the production of the relevant product, and thus entering its market.<sup>104</sup>

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<sup>98</sup> See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p.63.

<sup>99</sup> Lianos, I (2013), *Some Reflections on the Question of the Goals of EU Competition Law*. *CLES Working Paper Series 3/2013*. Available at SSRN: <http://ssrn.com/abstract=2235875> Accessed on 21, Nov. 2014.

<sup>100</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5 pp.5-11. In practice the substitutability test assesses whether consumer will switch to another product in the event of a small increase of price of the product considered.

<sup>101</sup> *Idem*, paras. 15 *et seq.*

<sup>102</sup> *Idem*, para 39.

<sup>103</sup> See Case 6/72 *Europemballage and Continental v. Commission* [1973] ECR 215, at para. 32.

<sup>104</sup> Potential competition will be considered only in the assessment of the conduct in object, and not in the preliminary stage of market definition. Furthermore, the Commission has indicated in its notice that it will mainly focus on demand substitutability. See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C372/5, para. 14 and Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 76.

The identification of the relevant market is fundamental for the analysis under both Article 101 and 102 TFEU. In the perspective of an analysis of a conduct under Article 101, this procedure is necessary to evaluate the impact on trade of agreements or concerted practices, and whether the latter are capable of having the effect or the object of restricting or in any way distorting the conditions of competition within the common market. Similarly, in the context of an analysis under Article 102, an abuse of dominant position can be ascertained only after the definition of the relevant market and the existence of such a position of dominance.<sup>105</sup>

The definition of the market is therefore of fundamental importance in relation to its consequences: in a market narrowly defined it is more probable that undertakings will hold dominant positions, or that a collusive arrangement will eliminate the competition on the market.<sup>106</sup>

## **5. Restrictions under Article 101 TFEU. Rules and Derogations**

Once the framework of the relevant market has been established, it is possible to proceed with the analysis of the arrangement under the provisions of competition law.

Article 101(1) TFEU prohibits any agreement between undertakings or other forms of arrangements made by associations of undertakings which have the object or the effect of preventing, restricting or distorting the competition within the European Union.<sup>107</sup>

The provision aims therefore to sanction collusions or otherwise joint conduct between two or more undertakings, which are capable of restricting the competition to an appreciable extent and affecting trade between Member States.<sup>108</sup> Article 101 makes reference only to conduct that is characterised by a concurrence of wills<sup>109</sup> and in

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<sup>105</sup> See the judgment of the Court of First Instance (CFI) in Case T-111/08, *MasterCard and Others v Commission* [2012], ECR II-000, para. 171.

<sup>106</sup> See Niels, G., Jenkins, H. & Kavanagh, J. (2011) *Economics for competition lawyers*, Oxford University Press, Oxford, p. 347.

<sup>107</sup> See Article 101(1) of the Treaty on the Functioning of the European Union.

<sup>108</sup> Although, as mentioned before, the provision in itself does not mention the appreciability requirement. See *supra*, note 53.

<sup>109</sup> See Case T-41/96, *Bayer AG. V. Commission* [2000] ECR II-3383, para. 69.

general an element of coordination and collusion:<sup>110</sup> these are, more in particular, agreements, decisions and concerted practices. The Article in object is drafted in a form that aims at catching the collusion regardless of the form it takes, and a precise characterisation of the cooperation at issue will not alter in any way the analysis.<sup>111</sup>

The arrangement falling under Article 101 TFEU has as its object or effect the restriction or distortion of the competition within the market. The two conditions are not cumulative, and the arrangement will be caught if either the object, or its effect, is to restrict or distort the competition.<sup>112</sup> In particular, when an agreement or a conduct has an anti-competitive object, it will not be necessary to demonstrate its anticompetitive effects.<sup>113</sup> However, while the evaluation of the effects of a conduct might be quite easily carried out by the competent authorities, the identification of an arrangement which has as its object the restriction of the competition demands more attention. Indeed, only in relation to some hard-core forms of restriction, such as price fixing and other arrangements that clearly limit the output of a certain product, can the restrictive object be assumed as existing without the need to further investigate the matter.<sup>114</sup> This is because arrangements of this kind are by their very nature harmful to the competition on the market, to the point that they should be automatically prohibited, regardless of their actual effects on the market,<sup>115</sup> and, accordingly, they

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<sup>110</sup> While Article 102 TFEU regulates the individual conduct of undertakings operating within the EU, by prohibiting the abuse of dominant position that they might hold.

<sup>111</sup> See Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, para. 32. See also para. 128 of the Decision of the Commission 94/601/EC (IV/C/33.833 - Cartonboard), where the Commission held that it was not necessary to distinguish between an agreement and a concerted practice in case of complex infringements. However, the form of the conduct object of assessment may affect the approach taken to collect the evidences and to impose the penalty. See Marco Colino, S. (2011) *Competition Law of the EU and UK*, Oxford University Press, p. 154.

<sup>112</sup> See Case C-209/07, *Competition Authority v. Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meals Ltd (BIDS)* [2008] ECR I-8637, para. 15.

<sup>113</sup> See Joined Cases 56/64 and 58/64 *Consten and Gründig v Commission* [1964] ECR 299, at p. 342, and Case C-49/92 P, *Anic Partecipazioni*, [1999] ECR I-4125, para. 99.

<sup>114</sup> The Guidelines of the Commission on the application of Article 101(3) give some non-exhaustive examples of conduct that are considered restrictive by object. See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 21.

<sup>115</sup> Nicolas, P., (2009) *The Guidelines on the Application of Article 81(3) EC - A Critical Review*, IEJE Working Paper No. 4/2009. Available at SSRN: <http://ssrn.com/abstract=1428558>, last accessed on 5<sup>th</sup>, Dec 2014.

should not even be an object of exemption.<sup>116</sup> In relation to other kinds of conduct, the Commission should undertake an analysis that considers the content of the agreement and the objective pursued, the economic and legal context in which it will be applied, and the conduct of the parties on the market.<sup>117</sup> In this light the Court of Justice has intervened to prevent possible abuses of this decision making procedure.<sup>118</sup> The Court held that a restriction by object occurs, and can be found, when the arrangement hinders the competition in light of its objectives and the context in which it has been concluded, to the point that it is intended to modify the structure of the market.<sup>119</sup> Therefore, it has to be demonstrated that the agreement produces, by its very nature, an actual and sufficient degree of harm to the competition, while an assumption is not enough, or the mere capability of causing a restriction on the market.<sup>120</sup> Furthermore, in those cases in which the agreement affects a two-sided market, or two related markets, the ability of restricting competition by object has to be demonstrated in relation to all the markets involved.<sup>121</sup>

If the agreement is not restrictive by object, it will have to be assessed whether it produces or it is likely to produce restrictive effects. To assess those, the competitive

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<sup>116</sup> However, this strict position does not find support in the case law of the CJEU. In *GlaxosmithKline*, the CFI held that any agreement that restricts the competition, whether by its effects or by its object, may in principle benefit from an exemption. See Case T-168/01 *GlaxoSmithKline Services Unlimited vs. Commission*, [2006] ECR II-02969, para. 233.

<sup>117</sup> Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>118</sup> See Case C-67/13P *Cartes Bancaires v European Commission* [2014] n.y.p.. At para. 25 of the Judgment, the Court held that agreements which, inherently, pursue an objective the very nature of which is so serious or harmful that in order to establish that a conduct is restrictive by object, its negative impact on the functioning of competition is clear beyond doubt, and there is no need to assess its potential effect.

<sup>119</sup> See O'Regan, M., (2014), *Restrictions by object: duck and elephant hunting with the Court of Justice*, Kluwer Competition Law Blog, 20<sup>th</sup> October 2014, available at <http://kluwercompetitionlawblog.com/2014/10/20/restrictions-by-object-duck-and-elephant-hunting-with-the-court-of-justice/>

<sup>120</sup> However, this requirement appears to contradict the previous case law of the CJEU. See para. 31 of the Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-04529, where the Court held that the anti-competitive object of a concerted practice could be proved if the arrangement had the potential, or was simply capable of having a negative impact on competition.

<sup>121</sup> See Case C-67/13P *Cartes Bancaires v European Commission* [2014] n.y.p, para. 34.

situation that would exist in the absence of the agreement should be taken into account, as well as the impact on existing and potential competition.<sup>122</sup>

However, even private arrangements that present *prima facie* restrictive characteristics may still be excused from the prohibition when they pursue an aim that is recognised to improve competition within the market or if they are necessary for the pursuit of public policy interests.<sup>123</sup> In this context, the Court has held in *Wouters*<sup>124</sup> that, where restrictions are inherent to the pursuit of legitimate objectives, the conduct may be deemed not to fall under Article 101(1) TFEU.<sup>125</sup>

Furthermore, some types of vertical agreements are specifically excluded from the prohibition set out by Article 101(1) TFEU in light of their clear pro-competitive effects. Regulation 330/2010<sup>126</sup> stipulated that some vertical arrangements will normally satisfy the conditions of Article 101(3) TFEU, in light of the efficiencies they create, by facilitating coordination and reducing distribution costs. This block exemption regards vertical agreements or concerted practices between two or more undertakings operating at different levels of the production or distribution chain, provided that the suppliers and buyers part of the arrangement do not hold a market share exceeding 30 per cent on their respective markets. The exemption will not be effective where the conduct leads to vertical price fixing and territorial protection.<sup>127</sup>

## 5.1 Article 101(3) TFEU

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<sup>122</sup> See para. 24 of the Guidelines on the application of Article 81(3) of the Treaty, and Cases C-7/95 P, *John Deere Ltd v. Commission*, [1998] ECR I-3111, para. 77, and C-234/89 *Stergios Delimitis v Henninger Bräu AG*. [1991] ECR I-0935 paras 14 – 21.

<sup>123</sup> See Article 10 of the Regulation 1/2003, granting the Commission the power to issue Decisions declaring Article 101 not applicable to the arrangement in object. See also Heide Jørgensen, C., 2013, *Private Distortions of Competition and SSGIs*, in U., Neergard, E Szyszczak, J.W. Van De Gronden, M. Krajewski eds. *Social Services of General Interest*, The Hague, Netherlands, T.M.C. Asser Press, pp. 263 – 286.

<sup>124</sup> Case C-309/99, *Wouters* [2002], ECR I-01577.

<sup>125</sup> See *idem*, para. 97. This approach is particularly important as the Court has subsequently applied it in the *Meca Medina* Case. See *infra*, Chap. 3.

<sup>126</sup> Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [OJ L 102, 23.4.2010].

<sup>127</sup> Craig, P. P. & De Búrca, G. (2011) *EU law: text, cases, and materials*. Oxford: Oxford University Press, c2011; 5th ed, pp.972 *et seq.* Block exemptions are adopted only for a specific period of time, and they are kept under review throughout that period.



When an arrangement falls under the scope of Article 101(1), the only possible exemption from its prohibition might come from the fulfilment of the conditions set by Article 101(3) TFEU.<sup>128</sup> The Authority examining the conduct will therefore have to weigh up the restrictive effects produced, with the pro-competitive effects that the arrangement creates.<sup>129</sup>

The first of these conditions requires that the restrictive agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress.<sup>130</sup> Hence, this assessment should highlight the types of efficiency gains that the arrangement is capable of creating, and the economic importance of such benefits.<sup>131</sup>

The second condition mandates that the arrangement imposes only those restrictions that are indispensable to the attainment of the efficiencies. The restraint will be indispensable if the efficiencies could not be achieved in its absence,<sup>132</sup> and it should thus be established that there are no other less restrictive means to achieve those efficiencies.

The third requirement to be fulfilled is that consumers receive a fair share of the efficiencies generated by the agreement. In particular, this assessment requires the weighing of the negative and positive impacts of the arrangement on the consumers.<sup>133</sup>

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<sup>128</sup> Article 101(2) TFEU establishes that the restrictive arrangements prohibited by Article 101(1) are immediately void.

<sup>129</sup> Cseres, K.J., (2007), *The Controversies of the Consumer Welfare Standard*, *The Competition Law Review*, 3, 2, p. 156. Moreover, under Regulation No. 2821/71, the Commission is however specifically empowered to create block exemptions for agreements that fulfil the criteria of Article 101(3) TFEU. See CEE Regulation No 2821/71 of the Council of 20 December 1971 on application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices, [OJ L 285].

<sup>130</sup> Article 101(3) has to be construed as presenting four separated conditions, although its formulation does not clarify this aspect. See para. 5 of the Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101].

<sup>131</sup> See *idem*, para. 50.

<sup>132</sup> See *idem*, para. 79.

<sup>133</sup> In this context it has been decided to follow the order used by the Commission in its guidelines. See *idem*, para. 39. Indeed, as the condition related to the benefit of consumers requires a balancing of the pro- and anti-competitive effects, it is only logical that this exercise would not include those conduct that bring about restrictions that are not necessary to achieve the efficiencies. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 258, citing Faull and Nikpay (eds.) *The Ec Law of Competition*, para. 3.436.

Finally, the agreement must not eliminate the competition in respect of a substantial part of the product. Preserving the competition on the market is thus more important than creating short-term efficiency gains.<sup>134</sup> This factor, however, highly depends on the conditions of the competition existing on the market prior to the restrictive arrangement. Where the competition was already weak, restrictive agreements are more likely to eliminate the competition. Furthermore, if competition is eliminated in relation to price, innovation or other important factors, the agreement should be immediately regarded as illegal.<sup>135</sup>

In order to clarify some of the doubts and concerns related to the application and the interpretation of this provision, the Commission has published a series of Guidelines, which should inform the analysis under Article 101(3) TFEU.<sup>136</sup> The Guidelines clearly affirm that the conditions set out in Article 101(3) have to be cumulatively fulfilled in order to grant an exemption to a restrictive conduct.<sup>137</sup> These conditions are also exhaustive, meaning that when they are fulfilled, the granting of the exemption cannot be subject to further conditions.<sup>138</sup>

The Guidelines, however, do not completely fulfil their aim, as they leave some areas of uncertainty, particularly in relation to the definition of the type of efficiencies required and the passing on of the benefits to consumers.

### ***5.1.1 The benefit of Consumers***

The Guidelines firstly establish that the goal of Article 101 TFEU is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.<sup>139</sup> However, when it comes to the definition of

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<sup>134</sup> Guidelines on the application of Article 81(3) of the Treaty [OJ C 101], para. 105.

<sup>135</sup> See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>136</sup> Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004].

<sup>137</sup> As established by the relevant case law. See Case T-185/00 and others, *Métropole télévision SA (M6)*, [2002] ECR II-3805, paragraph 86.

<sup>138</sup> See Guidelines on the application of Article 81(3) of the Treaty [OJ C 101], para. 42.

<sup>139</sup> Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 13.

consumers, as those who should receive a fair share of the benefits, the notion used by the Commission does not coincide with that of final consumer.

Contrary to the area of Consumer Protection Law, where the term consumer is intended as comprising any natural person who is acting for purposes which are not related to his trade, business or profession,<sup>140</sup> its interpretation in the area of antitrust law is much broader. Indeed, in this context the notion is by no means limited only to final consumers, but it rather comprises also all the intermediate customers, direct or indirect user of the products, including the producers that receive the product of the agreement as an input, wholesalers, retailers and lastly final consumers.<sup>141</sup>

Thus, as set down in the Guidelines, consumers have to receive a fair share of the benefits created by the restrictive arrangement. It means that the passing on of the efficiencies produced should compensate ‘consumers’ for any negative effects that they suffer, or that the restriction will likely cause them.<sup>142</sup> The group of consumers affected by the restriction should therefore be substantially the same that receives the subsequent benefits. The Commission has in fact argued that negative effects on consumers in one geographic or product market cannot be compensated through efficiencies created on another unrelated market.<sup>143</sup> However, in cases where the two separated markets involved are nonetheless related and the consumers affected are the same, the efficiencies thereby created might be taken into account.<sup>144</sup>

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<sup>140</sup> See Article 2 of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [OJ L 304].

<sup>141</sup> Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 84.

<sup>142</sup> See *idem*, para. 85 and Cseres, K.J., (2007), *The Controversies of the Consumer Welfare Standard*, *The Competition Law Review*, 3, 2, p. 168.

<sup>143</sup> Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 43.

<sup>144</sup> Lianos, I. (2012) *Competition law in the European Union after the Treaty of Lisbon*, in *The European Union after the Treaty of Lisbon*, Ed. By Ashiagbor, D. Countouris, N., Lianos, I., Cambridge University Press, pp. 252 – 283.

For consumers, the net effect between the restriction and the efficiencies should be at least neutral.<sup>145</sup> If the agreement leads to an increase of prices, the compensation should take a form that is equally valued by consumers, such as an improvement in terms of quality or in the range of products offered on the market.<sup>146</sup> However, when an agreement improves the production, distribution or technical innovation, thus satisfying the first condition of Article 101(3) TFEU, the Commission usually assumes that consumers will consequently receive a fair share of this benefits.<sup>147</sup> Instead, according to the Guidelines, the Commission should carry out an economic analysis of the various factors, therefore also examining which efficiencies were passed on to consumers and whether those could amount to a fair share of the benefit.<sup>148</sup>

The Guidelines have also taken into account the possibility that the efficiencies might be produced only some time after the restriction occurred and the subsequent negative effects have taken place. In this case, the greater the time lag between the moments in which the effects are produced, the greater the benefit for consumers ought to be to compensate them for the loss suffered.<sup>149</sup>

### ***5.1.2 Economic efficiencies***

The efficiencies that an agreement might be capable of creating could take a number of forms: the arrangement might lead to economic efficiencies and non-economic

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<sup>145</sup> Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 85, and Joined Cases 56/64 and 58/66, *Consten and Grundig*, [1966] ECR 429, at p. 348.

<sup>146</sup> Lianos, I (2013), *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Working Paper Series 3/2013. Available at SSRN: <http://ssrn.com/abstract=2235875> Accessed on 21, Nov. 2014.

<sup>147</sup> See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 90 and for an example See *infra* the Decision of the Commission in the case COMP/C.2-37.398 *Joint selling of the commercial rights of the UEFA Champions League* at paras. 152 and 171.

<sup>148</sup> See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 95 et seq.

<sup>149</sup> See *idem*, para. 87. However, there is a certain inconsistency in taking into account future consumers but not consumers affected in markets not related to the one analysed. See Rosenboom N.S.R., (2013), *How does article 101(3) TFEU case law relate to EC guidelines and the welfare perspective?*, Seo Economic Research Working Paper, Amsterdam, p.9.

benefits.<sup>150</sup> Direct economic benefits may be defined as cost efficiencies, directly affecting the price of the product, and qualitative efficiencies, which are created through new or higher quality products, and greater product variety.<sup>151</sup> In some cases, the efficiency will in fact be of a qualitative nature, rather than involving a cost reduction. On the other hand, non-economic efficiencies may include cultural or environmental benefits, or may be related to employment, or other aspects strictly non-pecuniary.<sup>152</sup>

In the context of the Guidelines, however, the Commission has clearly affirmed that the only efficiencies that it will take into account are quantifiable benefits of an economic nature, intended as including only cost and qualitative efficiencies. Accordingly, other goals that have to be pursued under other Treaty provisions might be taken into account only insofar as they can be subsumed under the four conditions set out in Article 101(3).<sup>153</sup> Under this approach, other factors, for example cultural or societal, should not be considered, unless they would be capable of being translated into quantifiable economic efficiencies.<sup>154</sup> This theoretical stance should also be referred to objectives of public interest, which should be considered solely in the context of the analysis under Article 101(1) TFEU. If under Article 101(1) the restriction has been deemed to fall outside of the scope of the provision, in light of the public objectives that it pursues, it will not be necessary to analyse it under Article 101(3) TFEU.<sup>155</sup>

In some cases, however, the Commission itself has integrated public interest objectives into the assessment of the restriction under Article 101(3) TFEU. In *CECED*, for

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<sup>150</sup> See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 59 et seq.

<sup>151</sup> Townley, C., (2011), *Which Goals Count in Article 101 TFEU?: Public Policy and its Discontents*, European Competition Law Review. Available at SSRN: <http://ssrn.com/abstract=1894837>

<sup>152</sup> For a discussion on the nature of the efficiencies that might be created and accepted in this context, See OFT, Article 101(3)—A Discussion of Narrow versus Broad Definition of Benefits: discussion note for an OFT breakfast roundtable (London, Office of Fair Trading, May 12, 2010), available at [http://www.of.gov.uk/news-and-updates/events/roundtable-article101\(3\)](http://www.of.gov.uk/news-and-updates/events/roundtable-article101(3)).

<sup>153</sup> See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ C 101 of 27.4.2004], para. 44.

<sup>154</sup> See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>155</sup> Heide Jørgensen, C., (2013), *Private Distortions of Competition and SSGIs*, in U., Neergard, E Szyszczak, J.W. Van De Gronden, M. Krajewski eds. *Social Services of General Interest*, The Hague, Netherlands, T.M.C. Asser Press, pp. 263 – 286.

example, the Commission, rather than requiring individual consumers to benefit from the economic efficiencies created through the restriction, took into account collective benefits to the environment and balanced them against the restriction of the competition.<sup>156</sup> The Commission regarded those environmental benefits as a factor contributing to the improvement of production or distribution, or the promotion of economic or technical progress.<sup>157</sup> It therefore used a reference to a possible economic dimension of the environmental benefits to justify efficiencies that were not directly quantifiable in economic terms.<sup>158</sup>

In relation to this, the position of the Court of Justice appears to be more flexible, since it took account of different forms of benefit stemming from the agreements analysed, and also in relation to effects created not only on the relevant market identified, but also in other markets.<sup>159</sup> This latter approach might be seen as an expression of the obligation placed on the Member States and the EU institutions not to prejudice the achievement of the Treaty goals, where non-economic goals should be considered as well in the analysis under Article 101(3).<sup>160</sup>

To further complicate the matter, though, a number of Treaty articles prescribe that some non-efficiency considerations have to be taken into account in the implementation and enforcement of all EU policies,<sup>161</sup> thereby imposing such an obligation on the Commission and the Court of Justice as well. When these are the objectives that should inform the activity of the EU institutions, their relevance has to be taken into account in relation to competition law as well.

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<sup>156</sup> Commission Decision no. 2000/475/EC, *CECED* [1999] OJ L187/47, paras. 55–57.

<sup>157</sup> See Lianos, I. (2012) *Competition law in the European Union after the Treaty of Lisbon*, in *The European Union after the Treaty of Lisbon*, Ed. By Ashiagbor, D. Countouris, N., Lianos, I., Cambridge University Press, pp. 252 – 283.

<sup>158</sup> Petit, N., (2009), *The Guidelines on the Application of Article 81(3) EC: a critical review*, Working Paper Institut d'études Juridiques Européennes (IEJE), n. 4/2009.

<sup>159</sup> E.g. see Case T-213/00, *CMA GCM and Others v. Commission* [2003] ECR II-913, para. 227.

<sup>160</sup> See Townley, C., (2011), *Which Goals Count in Article 101 TFEU?: Public Policy and its Discontents*, European Competition Law Review. Available at SSRN: <http://ssrn.com/abstract=1894837>, and Joined Cases 501/06 P, C-513/06 P, C-515/06 and C-519/06 P, *GlaxoSmithKline* [2009] ECR I-9291.

<sup>161</sup> Examples of this horizontal provisions can be seen in relation to Cultural aspects (Article 167.4 TFEU), Consumer Protection (Article 169 TFEU), Economic, social and territorial cohesion (Article 174 TFEU), and Environment (Article 191 TFEU). See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 49.

## 6. Abuse of Dominant Position under Article 102 TFEU

The second main provision of EU competition law is Article 102 TFEU. This norm prohibits an undertaking which holds a dominant position on a specific market from abusing of its power.<sup>162</sup>

Dominance is established when an undertaking is in such a position of strength in the relevant market that it is able to prevent effective competition from rival undertakings and act to an appreciable extent independently of its competitors and consumers.<sup>163</sup> In plain words, dominance exists when an undertaking is able to use its power to obtain advantages or behave on the market in a way that would not be possible in conditions of effective competition.<sup>164</sup> Dominance does not require the constitution of a monopoly,<sup>165</sup> but just the ability to restrict competition through unilateral actions.<sup>166</sup> In this perspective, very large market shares are already considered solid evidence of the existence of a position of dominance.<sup>167</sup>

A position of dominance can be held by a single undertaking, or it can be identified in a collective conduct of a group of undertakings.<sup>168</sup> In this instance, the individual companies that exercise a collective dominance on the market have to be sufficiently

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<sup>162</sup> Sport Associations usually have practical monopolies over their sport, and therefore are likely to have a position of dominance over the organisation of sporting events in a specific territory. See Geeraert, A., (2013). *Limits to the autonomy of sport: EU law*, in: J. Alm, ed. *Action for good governance in international sports organisations*. Copenhagen: Play the Game/Danish Institute for Sports Studies, 151–184.

<sup>163</sup> See Case 27/76 *United Brands v Commission* [1978] ECR 207, para. 65.

<sup>164</sup> See the seminal work of Temple Lang, J., (1979), *Some Aspects of Abuse of a Dominant Position in EC Antitrust Law*, Fordham International Law Forum 1, 9-12.

<sup>165</sup> A Monopoly can be defined as an industry in which one producer supplies the entire market. See Marco Colino, S. (2011) *Competition Law of the EU and UK*, Oxford University Press, p. 249.

<sup>166</sup> In comparison, the Sherman Antitrust Act in the U.S. prohibits the constitution of a monopoly, and also the attempt of constituting such a monopoly. See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>167</sup> See Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, [1979] ECR 00461, para. 41.

<sup>168</sup> See the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009/C 45/02), para. 4.

connected amongst each other to adopt a conduct that restricts or eliminates competition on the market.<sup>169</sup>

An undertaking in such a position is therefore prevented from abusing of its power: dominant undertakings have in fact a special responsibility, in light of their power, to protect the undistorted competition on the common market.<sup>170</sup> European Union law does not prohibit the constitution of a position of dominance *per se*, but only its abuse.<sup>171</sup> It is therefore necessary to understand what the concept of abuse is before moving forward. The Court of Justice clarified that an abuse of dominance is a type of behaviour which can influence the structure of a market where the level of competition is weakened and hinder the competition still existing.<sup>172</sup>

Article 102 TFEU identifies some specific examples of conduct that amount to an abuse where put in place by a dominant undertaking. Thus, such an undertaking cannot impose unfair purchase prices, or selling prices or other conditions. It cannot limit the production, the commercialisation or the technical development of products to the prejudice of consumers. Furthermore, the application of dissimilar conditions to equivalent transactions will amount to an abuse of power, as well as making the conclusion of contracts subjects to supplementary obligations not connected with the object of that contract.<sup>173</sup>

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<sup>169</sup> Although, they do not have to be necessarily part of the same economic entity. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p.277, and Joined Cases T-68, 77, and 78/89, *Società Italiana Vetro SpA, v Commission*, [1992], ECR II-01403, paras. 357-358.

<sup>170</sup> See Case 322/81 *Nederlandshce Banden – Industrie Michelin NV v Commission* [1983] ECR 3461, para. 57. However, it should be clear that even dominant undertakings have the right to take fully part in the competitive process. See Van der Vijver, T. (2012), *Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?* in *Journal of European Competition Law & Practice*, p. 129.

<sup>171</sup> See Marco Colino, S. (2011) *Competition Law of the EU and UK*, Oxford University Press, p. 257. See also Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527, para. 24 and Case T-41/96, *Bayer AG V Commission* [2000], ECR II-03383, para. 176, where the Court held that the Commission was not entitled to prohibit unilateral conduct which did not amount to an abuse of dominant position, despite possible restrictive consequences could have arisen from it.

<sup>172</sup> See Case 85/76, *Hoffmann-La Roche & Co. AG v Commission*, [1979] ECR 00461, para. 91 and Case 6/72, *Europemballage and Continental v. Commission* [1973] ECR 215, where the Court held that the acquisition of shares in a competing undertaking which had the effect of increasing a position of dominance already held constituted an abuse.

<sup>173</sup> The list of conduct included in Article 102 TFEU is not exhaustive. See *idem*, at para. 26.



More in general, conduct that might constitute abuses are usually distinguished on the basis of the subject that suffers the harm caused by the restriction. An abuse will be named exploitative when it aims at harming the customers, by setting excessive prices for instance. Where the abuse is harming the competitors of the dominant undertaking or the competition in general, it is referred to as exclusionary.<sup>174</sup> The notion of exclusionary abuse includes conduct that have as their objective the elimination of competitors or in general the preservation of the position of dominance held by the undertaking on the market.<sup>175</sup>

As it was said also in relation to other restrictive conduct falling under Article 101 TFEU, an abuse of dominant position is considered to be relevant only when it has an appreciable effect on trade between Member States, if it interferes with the pattern of trade or the structure of the competition within the internal market.<sup>176</sup> The related assessment should take into consideration the volume of goods and services affected in comparison with the overall volume of the relevant market.<sup>177</sup>

The objective of Article 102 TFEU is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.<sup>178</sup> Similarly to the Guidelines on Article 101, the Guidance on Article 102 affirms that the goal of the provision is to prevent dominant undertakings from adversely affecting competition in a way leading to negative effects for consumer welfare.<sup>179</sup> In this sense, it could be argued that this provision is aiming at protecting the freedom to compete and the general structure of the market, as opposed to the

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<sup>174</sup> Chalmers, D., Davies, G. & Monti, G. (2014), *European Union law*, Cambridge University Press, Cambridge, United Kingdom, p.1035.

<sup>175</sup> See Marco Colino, S. (2011) *Competition Law of the EU and UK*, Oxford University Press, p. 280.

<sup>176</sup> See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 284.

<sup>177</sup> See Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] I-04863, Opinion of AG Kokott, para 72.

<sup>178</sup> See Akman, P., (2008), *'Consumer' Versus 'Customer': The Devil in the Detail*. ESRC Centre for Competition Policy Working Paper No. 08-34, citing EC Commission 'DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses' (Brussels, December 2005) available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

<sup>179</sup> See the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009/C 45/02), para. 19.

economic efficiencies that are instead pursued under Article 101 TFEU.<sup>180</sup> However, firms that are capable of dominating the market have also the kind of power that is likely to reduce the efficiency on the market itself. Indeed, under these circumstance the market lacks the competitive pressures that would be capable of preventing undertakings from raising prices and reducing output.<sup>181</sup> Furthermore, Article 102 does not focus on the interest of consumers, since it does not require evidence of consumer harm.<sup>182</sup> In particular, Article 102 TFEU does not require it to be demonstrated that the abuse had an actual or direct effect on consumers. Only the provision under Article 102(b) takes into account the consumers, when they might suffer a prejudice by an arrangement which can limit the production, marketing and technical development in a market.<sup>183</sup> The protection of the interests of consumers, in this perspective, should be assured by the prevention or prohibition of distortion of the market structure.<sup>184</sup>

Conduct capable of infringing Article 102 TFEU might still be considered acceptable when they can be objectively justified:<sup>185</sup> when arrangements are *prima facie* restrictive, they can be accepted<sup>186</sup> if based on legitimate commercial behaviours,<sup>187</sup> efficiency considerations<sup>188</sup> and public interest considerations.<sup>189</sup> Nevertheless, the

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<sup>180</sup> Lianos, I. (2013), *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Working Paper Series 3/2013. Available at SSRN: <http://ssrn.com/abstract=2235875> Accessed on 21, Nov. 2014.

<sup>181</sup> Chalmers, D., Davies, G. & Monti, G. (2014), *European Union law*, Cambridge University Press, Cambridge, United Kingdom, p.1031.

<sup>182</sup> Lianos, I. (2013), *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Working Paper Series 3/2013. Available at SSRN: <http://ssrn.com/abstract=2235875> Accessed on 21, Nov. 2014.

<sup>183</sup> Article 102(2) TFEU provides a list of conduct that are examples of abuse of dominant position, including (b) limiting production, markets or technical development to the prejudice of consumers. For a discussion on these aspects, see Marsden, P. and Whelan, P. (2006) '*Consumer detriment*' and its application in EC and UK competition law, 27(10) European Competition Law Review, 569 - 585.

<sup>184</sup> See Case T-219/99, *British Airways v Commission* [2003] ECR II-05917 para. 264.

<sup>185</sup> See e.g. Case 27/76, *United Brands v Commission* [1978] ECR 207, para. 184. See Van der Vijver, T. 2012, *Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?* in *Journal of European Competition Law & Practice*.

<sup>186</sup> It is for the dominant undertaking to demonstrate that the conduct is objectively justified. See Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paras 688 and 1144.

<sup>187</sup> See Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] 4 CMLR 23, paras. 21 and 22.

<sup>188</sup> See the Communication from the Commission—Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings [2009], OJ C45, para. 28. Efficiency considerations might be relevant where they are capable of creating benefits for consumers, hence in a way that can be compared with the Efficiency justification under Article 101(3) TFEU.

<sup>189</sup> See Van der Vijver, T. 2012, *Article 102 TFEU: How to Claim the Application of Objective Justifications in the Case of prima facie Dominance Abuses?* in *Journal of European Competition Law & Practice*, p. 122.

exclusionary effect created by the arrangement must have a connection with the benefit created and not go beyond what is necessary to attain the objectives.<sup>190</sup>

## **7. The role of the State on the Market**

While Article 101 and 102 TFEU provide a discipline for undertakings operating within the internal market, it might be said that Article 106 and 107 aim at regulating the intrusion of the State and its relationship with undertakings active on the national market. The intervention of the State might take place through public undertakings, controlled or owned by the State itself, or through the granting of unlawful advantages to private undertakings. The prohibitions set by Article 106 and 107 TFEU are therefore generally addressed to Member States, not to the undertakings.

If a regulation, a conduct or an arrangement falls into the scope of these Articles, the only possible exceptions are those expressly prescribed by the Treaty itself.

### **7.1 Article 106 TFEU**

Article 106 TFEU imposes the rules of competition law also on public undertakings and on those undertakings that provide a service of public interest, insofar as the application of such rules does not obstruct the completion of the tasks assigned. The provision consists of an exemption from the application of competition law for public undertakings in cases in which they are carrying out services of public interest. However, the development of trade must not be therein affected to an extent that would be contrary to the interest of the Union.<sup>191</sup>

The concept of public undertaking includes entities over which the public authorities may exercise, directly or indirectly, a dominant influence, through ownership or

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<sup>190</sup> See Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, para. 86. Moreover, the restriction should not eliminate competition, as from Case C-209/10 *Post Danmark v Konkurrencerådet* [2012] 4 CMLR 23, para. 42.

<sup>191</sup> This is expression of the duty of Member States to loyally cooperate for the objectives of the Union, as established by Article 4 TEU. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 603.

control.<sup>192</sup> This notion has to be broad enough to comprise the differences existing amongst Member States, and prevent them from adopting their own definition, which would deprive the provision of its effects. In relation to these undertakings, Article 106 (1) TFEU prohibits Member States from enacting or maintaining in force any measure contrary to EU competition law, and which are therefore likely to distort competition on the market.<sup>193</sup>

In relation to undertakings entrusted with the operation of services of general economic interest,<sup>194</sup> Member States must have specifically assigned them a certain task or function,<sup>195</sup> or certain obligations must have been imposed on them by the State in the pursuit of the general economic interest.<sup>196</sup> This notion includes the use of an undertaking as an instrument of economic, social and fiscal policy,<sup>197</sup> which delivers outcomes in the overall public good that would not be supplied by the market without public intervention.<sup>198</sup>

The entrustment of a public service task implies that the undertaking will supply a service that it would have not carried out if it was considering only its own commercial interest.<sup>199</sup>

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<sup>192</sup> The definition is taken from Article 2(b) of the Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318/17).

<sup>193</sup> Again, this is a general provision that aims at comprising a number of different measures, without defining them strictly. For a list of examples of these types of measure, see Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 628 *et seq.*

<sup>194</sup> Services of General Economic Interest are regulated also in Article 14 of the Treaty of the European Union, Protocol no. 26 on Services of General Interest, and a number of soft law provisions. It must be noticed, however, that there is no official definition of Services of General Economic Interest, and therefore the notion has to be construed through the use of the case law. See Ølykke, G.S. & Møllgaard, P. (2013), *What is a service of general economic interest?* European Journal of Law and Economics.

<sup>195</sup> See the Decision of the Commission 85/77/EEC of 10 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.717 - *Uniform Eurocheques*), [1985], OJ L35/43.

<sup>196</sup> See Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer*, [1998] ECR I-4075, Opinion of Jacobs AG, para. 103.

<sup>197</sup> Case C-202/88, *France v. Commission* [1991] ECR I-1223, para. 12, and Case C-67/79, *Albany International v Stichting* [1999] ECR I-5751, paras. 103-105.

<sup>198</sup> See the Communication of the Commission of December 2011, A Quality Framework for Services of General Interest in Europe, COM (2011) 900 final, pp.3-4.

<sup>199</sup> See the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C 8/4, para. 47.

Undertakings providing services of public interest are usually subject to some form of regulation or control by the State, even if the latter does not hold direct ownership of the company. The services that these undertakings carry out will be characterised for being accessible to the public, for their continuity, quality and affordability, and for the protection of consumers.<sup>200</sup> The reduction of the autonomy in setting regulations, prices and other conditions could therefore be seen as the price to be paid for a possible exemption from the rules of competition law. The State will in fact impose specific legal obligations on that company to perform a defined public service, under certain conditions.

It is up to Member States to identify those companies that carry out an activity constituting a service of general economic interest. Article 106 TFEU provides only a proportionality requirement, which means that the Commission has only the power to test the determination when there has been a manifest error of assessment.<sup>201</sup> The identification will be justified where the compensation for the provision of the service does not exceed the cost sustained, plus a reasonable profit,<sup>202</sup> and whether in the event that such an undertaking would cease providing the service of general interest, the obligation would be transferred to the State.<sup>203</sup>

The most common example of public undertakings for the analysis that will be carried out in the thesis could be provided by public broadcasting companies.<sup>204</sup> However, other entities active in the sporting sector can take the form of public bodies too. The

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<sup>200</sup> See the Communication from the Commission — Services of general interest in Europe, (OJ 2001, C 017), at para. 14, and Davies, J., & Szyszczak, E. (2011). *Universal service obligations: Fulfilling new generations of services of general interest*. In E. Szyszczak, J. Davies, M. Andenæs, & T. Bekkedal (Eds.), *Developments in services of general interest*, pp. 155–177. The Hague: TMC Asser Press.

<sup>201</sup> See Case T-289/03. *BUPA v. Commission* [2008] ECR II-18, at para. 166, citing the Communication from the Commission — Services of general interest in Europe, (OJ 2001, C 017), at para. 22.

<sup>202</sup> See Case C-96/94, *Centro Servizi Spediporto Srl v Spedizioni Marittima del Golfo Srl*, [1995] ECR I-2883, para. 7 and para.38.

<sup>203</sup> See the Communication from the Commission — Services of general interest in Europe, (OJ 2001, C 017), at para. 15.

<sup>204</sup> They would be carrying out an economic activity subject to the provisions of competition law. See 93/403/EEC: Commission Decision of 11 June 1993 relating a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 - *EBU/Eurovision System*), para. 45.

question that might be relevant in this scenario is whether sport in general can be considered as a service of general economic interest.<sup>205</sup>

## 7.2 State Aid

As mentioned before, Member States can distort competition within the internal market by favouring one or more undertakings. Hence, the last provision that will be discussed in this chapter is Article 107 TFEU. This norm sanctions any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition.

The objective of this legislation is to ensure that Member States, or public entities connected to Member States, do not distort competition and trade within the common market. The aim is to prevent private undertakings from being placed in a more favourable conditions than their competitors through State resources.<sup>206</sup> The Treaty contains a general prohibition, but it nevertheless recognizes that public intervention might be necessary in certain circumstances for the well-functioning of the economy and the promotion of the welfare of the citizens of the Union.<sup>207</sup> The aim is therefore to establish a balance between some legitimate forms of public intervention on the market and the protection required to ensure the conditions of fair competition.<sup>208</sup>

A State aid might be generally defined as an advantage conferred on a selective basis to specific undertakings by national public authorities,<sup>209</sup> which can be characterised as a transfer of resources from the State to a company, or a form of relief from charges

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<sup>205</sup> The Independent Sport Review argued that sport federations fulfil tasks of relevant general economic interest on the basis that in some EU Member States sport is identified as a Constitutional Right. See Arnaut J (2006) *Independent European Sport Review*, A report by José Luis Arnaut, p.105 and Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut, p. 133.

<sup>206</sup> See Case C-124/10 P, *European Commission v Électricité de France (EDF)*, [2012] ECR I-0000, para. 90.

<sup>207</sup> Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM (2007) 391 final} {SEC (2007)932} {SEC (2007)935} {SEC (2007)936} at para. 3.2.2.

<sup>208</sup> Braun, JD, (2008) *Article 87 EC*. In Castendyk, O. et al. (eds), *European Media Law*. Kluwer Law International, Alphen a/d Rijn, pp. 207 – 244.

<sup>209</sup> State Aid Action Plan COM (2005) 107 final, para. 7.

which the company has to bear in normal circumstances, when the advantage is provided without adequate compensation.<sup>210</sup>

From the general definition given above, it can be inferred that under the scope of the provision in question it is irrelevant the form that the aid takes. The concept of State aid is therefore a broad one and might include subsidies,<sup>211</sup> tax reliefs,<sup>212</sup> guarantees<sup>213</sup> or provision of goods and services on preferential terms.<sup>214</sup> There is no exhaustive list of measures falling under the State aid rule: the norm regulates any form of aid or subsidy granted by a Member State to private undertakings.<sup>215</sup> Hence it is the effect of the measure, rather than its denomination, form, causes and objectives that has to be scrutinised.<sup>216</sup>

The most important characteristic of the measures under the scope of this analysis is the fact that they are intended to favour certain specific undertakings in the production or distribution of goods. The selective advantage places the undertaking in a position that it would not have reached under normal market conditions. There cannot be selectivity if the measure is general and applicable to all the companies operating within the Member State,<sup>217</sup> and the requirement will be satisfied only where the undertaking is chosen in light of properties that are specific to it, and differentiate it from other categories.<sup>218</sup>

In order to appreciate this aspect, the selectivity has to be assessed by means of a three-step test: firstly the system of reference has to be identified, then it will be determined

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<sup>210</sup> This relates to the Market Economy Operator Principle, which will be discussed further. See *infra* §7.2.1

<sup>211</sup> Case C-403/10 P, *Mediaset SpA v. Commission* [2011] ECR I-117, affirming Case T-177/07, *Mediaset SpA v. European Commission* [2010] ECR II-2341.

<sup>212</sup> Such as in Cases T-415, 416 and 423/05, *Greece v. European Commission* (Olympic Airways and Olympic Airlines) [2010] ECR II-4749; see also Cases T-53, 62, 63, and 64/08, *Italy v. Commission* [2010] ECR II-3187 (preferential electricity tariff).

<sup>213</sup> See Case SA.39086 Welsh Government Capital Investment and Employment Aid Scheme, not decided at the moment of writing.

<sup>214</sup> The Commission has enacted a series of soft law measures providing guidance in relation to some of the main areas where State aid can take place. See the Commission website at [http://ec.europa.eu/competition/state\\_aid/legislation/instruments.html](http://ec.europa.eu/competition/state_aid/legislation/instruments.html)

<sup>215</sup> See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., *State aid chapter*, p.27.

<sup>216</sup> See Case 173/73, *Italy v. Commission* [1974] ECR 709, para. 13.

<sup>217</sup> Case C-156/98, *Germany v. Commission* [2000] ECR I-6857, para. 22.

<sup>218</sup> In comparison with other undertakings which are in a similar condition. See Case C-487/06 P, *British Aggregates v. Commission* [2008] ECR I-10505, para. 82.

whether the measure constitutes a derogation from that system and if it differentiates between operators who are in a comparable situation; and finally it will be assessed if the measure is justified by the general nature of the system.<sup>219</sup> The authority investigating the measure has thus to identify and examine the regime that is usually applicable to this type of undertaking in the Member State concerned, and consider whether the granting of such a measure is expression of a discretionary power.<sup>220</sup>

The notion of State aid is referred only to those measures that are granted by the State or through State resources.<sup>221</sup> The current approach of the European institutions in this regard is focused on the control exercised over the measure, rather than on the original source of the funding. Public Authorities have to be involved in the deployment of the funding: any fund will be considered a State resource if it has passed under the control or at disposal of the State.<sup>222</sup> However, this broad definition includes also the granting of advantages made by regional or local authorities and even private bodies, as long as they are established or specifically appointed by the State to administer the fund.<sup>223</sup>

As it has been already said in relation to the other rules of competition law, a State aid is prohibited only if it is capable of affecting trade between Member States. In this regard, the Court has recognised that trade between Member States might be affected even when the undertaking involved does not trade across borders.<sup>224</sup> Moreover, the actual effect does not need to be proven, the potential restrictive consequence on trade is sufficient.<sup>225</sup> However, measures that provide only support for the construction of

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<sup>219</sup> Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014, para. 128.

<sup>220</sup> See Case C-200/97, *Ecotrade Srl v Altiforni e Ferriere di Servola SpA* [1998] ECR I-7907.

<sup>221</sup> These two conditions, however, have to be interpreted cumulatively. See Case C-482/99, *France v. Commission (Stardust Marine)* [2002] ECR I-4397, para. 24.

<sup>222</sup> See *idem*, para. 37.

<sup>223</sup> See Tomat, F. (2014), *State Resources and Imputability to the State: A Clarification on the Scope of the Pearle Judgment?*, European State Aid Law Quarterly: EStAL, vol. 13, no. 3, pp. 540, and Case C-379/98, *PreussenElektra AG v Schleswag AG* [2001] ECR I-2099, para. 58.

<sup>224</sup> See Case C-102/87, *France v Commission* [1988] ECR 4067, para.19.

<sup>225</sup> See Case C-730/79, *Philip Morris Holland BV v Commission* [1980] ECR 2671, para. 11. In this case, the Court also held that in the context of the analysis under Article 107 TFEU there is no need for the identification of the relevant market in the same specific terms that would have to be met under Article 101 and 102 TFEU. See para. 9.



local infrastructures are rarely capable of raising concerns as they do not carry inter-state implications, and therefore they do not affect trade between Member States.<sup>226</sup>

The role of the undertakings involved has to be carefully assessed from this angle as well. While the definition of an undertaking that has been given earlier in this chapter<sup>227</sup> maintains its validity in this context, the specific function and role of the individual undertaking comes into play. Indeed, when the entity receiving the grant is performing a State function, the measure will fall outside the scope of the provision. In particular, where the aid is granted to finance an undertaking providing services of general economic interest, the measure will be covered by Article 106(2) TFEU.<sup>228</sup> Similarly, where the funding is aimed at a public project that is not meant to be commercially exploited, it will not be considered unlawful, as it will not grant any advantages to the undertakings involved.<sup>229</sup> The measure will finally not be relevant where it is considered indispensable, and the market would not be able or willing to offer it.<sup>230</sup> Provided that the aid does not benefit some individual undertakings in particular, the rules of competition law will not prohibit it.

In the event that a measure will fall under the prohibition set by Article 107(1) TFEU, the only exemptions that are expressly mentioned within the Treaty are to be found in the second and third paragraphs of Article 107. Article 107(2) establishes that, in light of specific circumstances, some measures are deemed compatible with the rules of the internal market, leaving no discretion to the Commission to decide whether to exempt

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<sup>226</sup> See SG (2001) D/285046 *Local Swimming Pool*, Letter of 12.01.2001 from Commissioner Monti, and also the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1, at p. 14.

<sup>227</sup> See *supra* § 4.2

<sup>228</sup> See *supra*, § 7.1. In this regard the Commission has issued a number of provisions and, more in particular, a guide for the application of State aid to Services of General Economic Interests. See Commission Staff Working Document Guide to the application of the European Union rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest SWD(2013) 53 final/2 (replacing Commission Staff Working Document ‘Guide to the application of the European Union Rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest’ SEC(2010) 1545 final).

<sup>229</sup> See Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014, para. 37, and *a contrario* Case C-288/11 P, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v. Commission*, 19 December 2012, where the Court held that the funding for the construction of a runway used for commercial reasons amounted to an unlawful State aid.

<sup>230</sup> See the Decision of the Commission in the Case SA.31722 – Hungary, Supporting the Hungarian sport sector via tax benefit scheme, C(2011)7287 final, paras. 92 – 93.

them from the prohibition.<sup>231</sup> These types of aid are required to have a social character, being granted to individual consumers and not discriminating in relation to the origin of the products concerned. Other types of aid considered in this provision are those measures enacted to provide support for areas or sectors hit by natural disasters or other exceptional circumstances. Finally, aid granted to the economy of certain areas of the former Federal Republic of Germany affected by the division of Germany are deemed legitimate.<sup>232</sup> The Treaty thus leaves room for a number of public policy objectives that might be pursued through public resources, without falling under the prohibition set by Article 107 TFEU, provided that certain conditions are met.<sup>233</sup>

Furthermore, Article 107(3) lists a number of measures that may be considered compatible with the provisions of the Treaty in light of the objectives they pursue:<sup>234</sup> they will be accepted only insofar as they contribute to the achievement of those common objectives set out by the Article itself.<sup>235</sup> Therefore, contrary to the previous provision, these measures are not deemed compatible with EU Law *a priori*, and the Commission has some discretion in deciding whether to exempt them from the general prohibition.<sup>236</sup>

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<sup>231</sup> See Case T-268/06, *Olympiaki Aeroporoi Ypiresies AE v. Commission* [2008] ECR II-1091, para. 51. The Member State granting the measure will nevertheless have to notify it to the Commission, but once this requirement is fulfilled, the aid will be automatically lawful. See Marco Colino, S. (2011) *Competition Law of the EU and UK*, Oxford University Press, p. 420.

<sup>232</sup> As from the Article, after five years from the entry into force of the Treaty of Lisbon the Council, acting on a proposal from the Commission, may adopt a decision to repeal this final point. At the time of writing this has not happened yet.

<sup>233</sup> As the list of derogations provided by Article 107(2) presents a series of exception from the prohibition set out, it has to be interpreted narrowly and it is exhaustive. See Cases C-346/03 and C-529/03, *Giuseppe Atzeni and Others v. Regione autonoma della Sardegna* [2006] ECR I-1875, para. 79.

<sup>234</sup> Article 107(3) TFEU states that measures may be found compatible with the internal market if they (a) promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; or (b) promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; or (c) facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest; or (d) promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest; or finally in relation to (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

<sup>235</sup> And provided that the modalities and intensity of the aid are commensurate with the objective. See Commission's XIIth Report on Competition Policy (Commission, 1982) point 160.

<sup>236</sup> See in relation to this Case C-730/79, *Philip Morris Holland BV v Commission* [1980] ECR 2671, para. 17.

The institution will carry out an assessment of the measure, weighing up the benefits it might create, against the restriction to free competition that it is likely to cause.<sup>237</sup> Finally, other categories of aid might be specifically exempted by a Decision of the Council on a proposal from the Commission.

Measures that are likely to amount to forms of State aid must generally be notified to the Commission, which will assess their compliance with EU law, before being enacted by the Member State.<sup>238</sup> While paragraphs 2 and 3 of Article 107 provide for a strict set of exemptions, the Council has enabled the Commission to adopt a number of so-called Block Exempting Regulations for some types of State aid.<sup>239</sup> Under these regulations, the Commission can declare specific categories of State aid to be compatible with the Treaty, provided that they fulfil certain criteria.<sup>240</sup> The Commission has enacted a series of these regulations, the last at the time of writing being the GBER II.<sup>241</sup> The inclusion of a particular kind of measure in the Block Regulation exempts the State from the requirement of prior notification of the measure and Commission approval.<sup>242</sup>

### **7.2.1 Market Economy Operator Principle**

When the Commission has to analyse the compliance of a State aid measure with the provisions of the Treaty, one principle that will have to be taken into account is the Market Economy Operator Principle. Under this type of test, a public authority is fully

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<sup>237</sup> State Aid Action Plan COM (2005) 107 final, para. 19.

<sup>238</sup> As from Article 108 (3) TFEU. This in fact guarantees the Commission the possibility of approving measures in advance under Article 107 (3) TFEU. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., *State aid chapter*, p.5.

<sup>239</sup> Council Regulation No 994/98 of 7 May 1998, amended by Council Regulation No 733/2013 of 22 July 2013

<sup>240</sup> The Block Exemption Regulation includes measures enacted in the following sectors: SMEs, Research, Development and Innovation, environmental protection, employment and training, regional aid, and *de minimis* aid that excludes the application of the rules for measure below a certain threshold.

<sup>241</sup> See Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1. This is in particular important in the context of this study, as it provides an exemption also for the funding of sports and recreational infrastructures. See *infra*, Chap. on State Aid.

<sup>242</sup> A Block exemption regulation is possible only in relation to those areas where the Commission and the Member States have acquired a good level of experience through established practice and case law. See Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM (2007) 391 final} {SEC (2007)932} {SEC (2007)935} {SEC (2007)936} at p.28.

entitled to operate on the market under the same terms and conditions to which a private operator would agree.<sup>243</sup> Where this is the case, the selected undertaking that gets funded or that is part of the arrangement does not get an advantage from the granting of the investments, as it could have received the same financing from the market.<sup>244</sup> The same principle applies for the assessment of loans granted to undertakings or for waiver or restructuring of debts.<sup>245</sup> Where this test is applicable, the Commission is under a duty to take the principle into account to establish the existence of a State aid.<sup>246</sup> The Member State granting the measure under assessment has thus to demonstrate that the decision of the public authority is based upon economic evaluations that are comparable to those that a private investor would have carried out in order to determine the profitability of its investment.<sup>247</sup>

The Commission has discussed the methodologies that may be employed when assessing a measure under the Market Operator Test.<sup>248</sup> The first and most immediate method of comparison looks at the price paid for the sale and purchase of similar assets, goods and services. In this case the market price is the highest price that a private vendor is willing to pay for a public asset, or receive for the selling.<sup>249</sup> However, a private operator might accept an offer lower than the higher bid, where

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<sup>243</sup> See Case C-124/10 P, *European Commission v Électricité de France (EDF)*, [2012] ECR I-0000, para. 78.

<sup>244</sup> Slocock, B. (2002), *The Market Economy Investor Principle*, Competition Policy Newsletter, reiterating that the presence of an advantage in a State aid measure is assessed by reference with what would have been the situation in the absence of the measure.

<sup>245</sup> And can therefore be expressed as Private Investor Principle (see e.g. C-303/88, *Italy v Commission* [1991] ECR I-1433, paragraph 20), or Private Creditor Principle (see e.g. Case C-342/6, *Spain v. Commission (Tubacex)* [1999] ECR I-2459).

<sup>246</sup> In *EDF* the Court of Justice annulled the decision of the Commission that had not applied the Test. However, the Test is not applicable to measures that are enacted by a public authority exercising its regulatory or fiscal power, rather than carrying out an economic activity. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., *State aid chapter*, p.52 - 53.

<sup>247</sup> See Case C-124/10 P, *European Commission v Électricité de France (EDF)*, [2012] ECR I-0000, para. 85.

<sup>248</sup> Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU, 17 January 2014, para. 100 *et seq.*

<sup>249</sup> See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., *State aid chapter*, p. 59, and Case C-390/98, *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry*, [2001] ECR I-6117, paragraph 77.

justified by considerations other than price. Hence, if a private operator would take those factors into account, the same can be done by a public authority.<sup>250</sup>

Where it is not possible to refer immediately to market data to establish whether a transaction is in line with market conditions, the assessment might use a benchmarking system or other methods. When the transaction is assessed through the benchmarking system, the conditions are compared with terms and conditions of a transaction that would have been carried out by comparable private operators in a comparable situation. In this scenario, it is necessary to pay particular attention to the type of operator involved in the transaction, the type of transaction and the characteristics of the market concerned. Alternatively, the transaction might be assessed on the basis of generally accepted standards,<sup>251</sup> based on the available objective and data.

Finally, although it is assumed that the conduct of a private investor on the market is guided by the aim of maximising profits without running excessive risks, and in light of an average return of the investment in relation to a particular commercial sector,<sup>252</sup> the Commission has an obligation to take into account all the factors that influence a transaction. The Courts have therefore accepted that the private investor may not require only a short-term return of its investment, and a structural policy of long-term profitability might be considered as well, depending on the circumstances of the case.<sup>253</sup>

## 8. Conclusion

This chapter has tried to illustrate the main notions, principles and provisions of competition law that are applicable within the market of the European Union.

This part of the project has intentionally avoided any reference to the sport system, with the aim of giving a clear general framework, which will be used to analyse the rules and conduct in sport and sports related matter. It is however possible to foresee

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<sup>250</sup> See Commission Decision 2008/719/EC on State aid C56/06 implemented by Austria for the privatisation of Bank Burgenland [2008] OJ L 239/32, paras 120–122.

<sup>251</sup> See Case T-366/00 *Scott v Commission* [2007] ECR II-797, para. 134.

<sup>252</sup> Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale v. Commission* [2003] ECR II-435, para. 255.

<sup>253</sup> See Case C-305/89, *Italy v. Commission (Alfa Romeo No. 1)* [1991] ECR I-1603, para.20.

that all the provisions mentioned in this chapter might be applied to specific rules and arrangements existing within a sport system. It is important to stress the objectives of the rules and the interpretation and standard chosen by the authorities in the context of their application. The main question in this regard is whether considerations other than economic-efficiency might find their way within the application of competition law, and which provisions entail the possibility of taking them into account.

In the following sections, the thesis will therefore endeavour to establish whether and how these provisions have been applied to sport, and try to identify a systematic approach in this process, in order to understand how some areas of the sports system could be regulated in the future.

## CHAPTER TWO: Sporting Value

**1. Introduction; 2. Sport and the Law; 3. Categorisation of Sporting Rules; 4. The European sport system; 5. Sport Specificity and Consequences; 5.1. The Characteristics of Sport; 5.2. Sporting practice v. economic activity; 5.3. The Sporting Labour Market; 5.4 The Sporting Product Market; 6. EU Sports Policy; 6.1. The White Paper on Sport; 6.2. The Lisbon Treaty; 7. EU Sports Law; 8. Conclusion**

### **1. Introduction**

This chapter will analyse the values and characteristics that underlie the sport system, as opposed to the rules of the market discussed in the preceding chapter. The chapter assesses whether there is a need for a specific application of the rules of competition law to sports related matters. In doing so, it is necessary to understand the features and characteristics of sport.

Sport is a phenomenon uniquely characterised by an interaction between socio-cultural and commercial aspects, which have to find a balance. In this context, the fact that the fundamental nature of sport is to provide entertainment distinguishes the game itself from productive activities.<sup>254</sup> However, this nature has been profoundly impacted upon by the commercial aspirations and goals pursued by sports associations, leagues and clubs. It is therefore important to assess whether and to what extent these aspects are capable of affecting the nature of the sporting activity, and the matters related to it.

The first part of the chapter will present an overview of the debate on the application of law to sport, taking into consideration the positions of Academics that have taken part in the discussion from its origin, including those who have taken a rigorous position in applying law to sport and those who seek to rely more on the autonomy and specificity of sport. In this context, it is also important to clearly highlight the classification of the

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<sup>254</sup> See the citation from *Scalia J, dissenting, PGA Tour, Inc v Martin* 532 US 661 (2001) 204 F 3d 994, *affirmed*, in Gardiner, S., Gardiner, S., O'Leary, J., Welch, R., Boyes, S. & Naidoo, U. (2012) *Sports law / Simon Gardiner ... [et al.]*. Abingdon; New York: Routledge, 2012; 4th ed, p.69.

sporting rules that will be adopted for the remaining part of the thesis. In order to present a coherent subdivision, this discussion will consider the nature of these rules and the objectives they pursue. This process, which will continue throughout the thesis, will allow us to understand whether rules and conduct are treated differently in relation to their purpose or justification, and therefore to what extent and depth the application of competition law has taken these elements into account.

The second part of the chapter will seek to assess what the inherent characteristics of sport are. Starting from the nature of the activity, and moving to the economic aspects and the differences with other industries, the section will also endeavour to identify the consequences that may be derived from this assessment. In order to offer a comprehensive analysis of the topic, the research will be focused on the characteristics of the product that the industry offers on the market, and of the labour market within the sporting industry.

The assessment of the features presented will answer one of the fundamental questions underlying the research and provide an original contribution to the body of knowledge. Finally, the chapter will provide an overview of the way European institutions have framed their policy towards sport throughout the years. In this regard, account will be taken of the soft law measures that have been adopted by the various institutions, with the objective of assessing also their relevance in the context of the development of European sports law.<sup>255</sup> This will help identifying the relationship framework that has been established between EU institutions and Sports Governing Bodies, and it will allow the research to offer an analysis of its effectiveness under a legal point of view.

## **2. Sport and the Law**

There is no general definition of sport commonly accepted and recognised.<sup>256</sup> Much of the literature tends to identify sport as a vehicle towards some specific objectives,

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<sup>255</sup> See Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>256</sup> See Soek, J., (2006) *Sport in national sports acts and constitutions: definition, ratio legis and objectives*. International Sports Law Journal 3-4:28-34.



either societal, commercial, or cultural.<sup>257</sup> However, the European Sports Charter of the Council of Europe refers to sport as any form ‘*of physical activity*<sup>258</sup> *which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels.*’<sup>259</sup>

The phenomenon of sport is multifaceted and can be discussed in relation to its role as a physical and leisure activity, or its role in society, or the economic aspects that it involves. However, in order to proceed with the analysis and give account of the values and characteristics of sport, it is necessary to provide an overview of the discussion about the general application of law to sport and the notion of sports law, before moving to more specific considerations.

When we first think about sport there are certain aspects that immediately confer it a degree of exemption from the application of ordinary law. The epitome of this concept is represented by contact disciplines, such as boxing, where hitting and causing injuries to another person is the main purpose of the sport itself, with only very limited intervention of criminal law.<sup>260</sup> Similarly, labour law does not apply to athletes in the same way as it is applied to workers in other industries.<sup>261</sup> Furthermore, the commercial exploitation of sports rights may highlight again another different application of the law to sports related matters.<sup>262</sup> These kinds of considerations have led to a debate

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<sup>257</sup> Malloy DC (2003) *Understanding the nature of ethics, and purposes of business health care and law. The sport we want: essays on current issues in community sport in Canada*, Canadian centre for ethics in sport, pp 59–79.

<sup>258</sup> The High Court has held that the physical nature of sport is its preeminent characteristic, and it consequently prevents activities such as bridge and chess from being included in the category. See *The Queen (on the application of) English Bridge Union Limited v The English Sports Council v The Scottish Sports Council, The Sports Council for Wales, The Sports Council for Northern Ireland, The United Kingdom Sports Council, The Secretary of State for Culture, Media and Sport*, [2015] EWHC 2875, para. 41.

<sup>259</sup> See definition of Sport given by the Council of Europe in the European Sports Charter (2001) and also European Commission (1998) Commission staff working paper – the development and prospects for community action in the field of sport.

<sup>260</sup> See Anderson, J., (2010), *Modern sports law: a textbook*, Hart, Oxford, pp. 199 et seq.

<sup>261</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, p.36.

<sup>262</sup> The collective selling of broadcasting rights, although restrictive of the competition, has been considered lawful in a number of occasions. See *infra Broadcasting Right* chapter, §. 3.

revolving around the general application of law to sport, resulting in a dichotomy between two opposite factions.

On the one hand, there is a group of academics which take the lead from Grayson and his approach to the topic. They claim that a discipline called sports law cannot be identified as such, as it is only possible to study the relationship between the phenomenon 'sport' and the law.<sup>263</sup> Disputes involving sport, at all levels, could not be labelled as sports law matters, but should be resolved by simply applying the law to the facts of the case, which would just so happen to involve sport.<sup>264</sup>

On the other hand, a number of commentators contend that the term 'sports law' has, throughout the years, come to identify a specific area and discipline of law, constituting a vertically integrated field of study.<sup>265</sup> This position is supported by a number of different elements: the enacting of legislative measures expressly aiming to regulate some sectors of sport, the existence of sport tribunals with relevant expertise in the field, the fact that Universities have started to include sports law within the modules delivered, and the existence of textbooks in the area.<sup>266</sup>

In general, the term 'sports law' could be intended to include the application of traditional law disciplines to sport. However, this idea also includes the impact that statutory provisions might have on sport, such as issues of public and social policy and finally *lex sportiva*.<sup>267</sup> This last notion refers to an autonomous legal order with its own set of rules and principles, created, adopted and enforced by national and international sports federations and tribunals.<sup>268</sup> In this context, the main role is held by the Court of Arbitration for Sport,<sup>269</sup> which represents the 'Supreme Court of World Sport',<sup>270</sup> being

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<sup>263</sup> See Grayson, E. (1998), *Sport and the Law*, London: Butterworths.

<sup>264</sup> See Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>265</sup> Beloff, MJ (2005), 'Is There a Lex Sportiva?', *Sweet And Maxwells International Sports Law Review*, 5, 3, pp. 49-60.

<sup>266</sup> See Opie, H, (1996) 'Sports associations and their legal environment', in McGregor-Lowndes, M, Fletcher, K and Sievers, S (eds), *Legal Issues for Non-Profit Associations*, Sidney: LBC, pp 74-94.

<sup>267</sup> See Anderson, J., (2010), *Modern sports law: a textbook*, Hart, Oxford, pp. 20 – 23. Anderson contends that the term *lex sportiva* was first used by the Secretary General of CAS Matthieu Reeb.

<sup>268</sup> See Foster, K., *Lex sportiva and Lex Ludica: The Court of Arbitration for sport's jurisprudence*, in Blackshaw, I., Siekmann, R., Soek, J., (2006), *The Court of Arbitration for Sport 1984 — 2004*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>269</sup> The Court of Arbitration for Sport, hereafter also CAS, is an arbitration body created by the International Olympic Committee in 1983, and it is based in Lausanne, Switzerland.

the body called upon to resolve private disputes related to sport. The CAS hears disputes arising from arbitration clauses, or as the last instance tribunal for decisions related to anti-doping violations and other decisions made by tribunals of sports federations, when the statutes so provide.<sup>271</sup>

The concept of *lex sportiva* may also comprise the notion of domestic sports law and global sports law:<sup>272</sup> they refer to the area of influence of sporting bodies and of their rules, which can be framed either nationally or internationally.<sup>273</sup> Foster, in particular, contends that the definition of *lex sportiva* should be replaced by the term global sports law, referring to a private contractual order established between international sporting federations and those subject to their jurisdiction.<sup>274</sup> This term may thus have relevance only in relation to awards made by sporting tribunals.<sup>275</sup>

This definition, however, is of great importance as it highlights one of the main characteristics of the sport system. Sports Governing Bodies are empowered to set rules and impose them on anyone subject to their jurisdictions. However, this authority has not been granted to them by the State or any other public entity, but it rather derives from a set of contractual relationships. As such, it is fundamentally based on the consensus of the subjects, who in theory have accepted the authority of a self-regulating institution that has created its own private legal order, with private dispute settlement procedures.

On the other side of the spectrum, the set of ordinary legal principles and statutory provisions applicable to sport may be defined as International sports law, European sports law and national sports law. These may be distinguished from the category previously mentioned, as they will be applied by national courts, whereas global sports

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<sup>270</sup> See Swiss Federal Tribunal in its judgment of 27 May 2003, *Lazutina & Danilova v. Comité International Olympique (IOC) & Fédération Internationale de Ski (FIS)*, at p. 267 *et seq.*

<sup>271</sup> See Reeb, M., *The role and Functions of the Court of Arbitration for Sport*, in Blackshaw, I., Siekmann, R., Soek, J., (2006), *The Court of Arbitration for Sport 1984 — 2004*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>272</sup> See Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>273</sup> As opposed to national sports law and international sports law.

<sup>274</sup> See Foster, K., *Is there a global sports law*, in Siekmann, R.C.R. & Soek, J. (2012), '*Lex sportiva: what is sports law?*', T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>275</sup> Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

law implies a claim of immunity from national law, in the name of the autonomy of sport tribunals.<sup>276</sup> International sports law comprises those principles of international law that are applicable to sport, including those that underpin the constitutional safeguards existing in most of the western countries.<sup>277</sup> The term national sports law includes instead the national rules and legislation applied to sport,<sup>278</sup> as well as the set of case law of national courts and tribunals in sports-related matters. Finally, European sports law<sup>279</sup> refers to the sports-related activity of the EU institutions, including in particular the case law of the Court of Justice and the decision practice of the European Commission.

### **3. Categorisation of the Sporting Rules**

Having discussed the general notion of sports law, and the different elements that may be comprised under it, it is now necessary to clarify which rules in particular will be considered in the context of this research, and how these have been divided into categories.

Indeed, the rules of the sport system can be distinguished in relation to the objective they pursue and the way they are justified by the sporting bodies adopting them. However, the rules that will be presented are also capable of affecting different markets in the sporting industry. Three main markets can be identified in the sporting sector: the first is where the product of the industry is exploited. This is where the sporting associations or the individual clubs sell the commercial rights related to the contest they produce. Upstream to this market there is a second market, where the performances that will be exploited are produced. The third market is the supply market, where the clubs purchase or transfer the main production factor, which is the

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<sup>276</sup> See Foster, K, *Is there a global sports law*, in Siekmann, R.C.R. & Soek, J. (2012), *Lex sportiva: what is sports law?*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>277</sup> Such as the principle by which agreements are binding, and that parties to a dispute have to be treated fairly and proportionately, to name but a few. See James, M. (2013), *Sports law*, Second edition, Palgrave Macmillan, Basingstoke, p. 19.

<sup>278</sup> In this regard Siekmann makes reference to the Sports Code enacted in a number of States, including France and Portugal. See Siekmann, R.C.R. (2013), *'Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states'*, Shaker Verlag, Aachen.

<sup>279</sup> See Weatherill, S., *Is there such thing as EU Sports Law*, in Siekmann, R.C.R. & Soek, J. (2012), *Lex sportiva: what is sports law?*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

labour. Players and athletes form the main supply source for individual clubs, that operate on this market.

Borrowing from the seminal work of Foster,<sup>280</sup> we may identify three main categories of sporting rules that have to be considered in this research. The first group can be subsumed under the notion of ethical principles of sport: they aim at protecting the integrity and fairness of the game, as it is the case for anti-doping rules<sup>281</sup> and to some extent the UEFA<sup>282</sup> Financial Fair Play Rules.<sup>283</sup> This set of rules and regulations constitutes a legal order with its own characteristics that is specific to each sporting discipline. Albeit pursuing legitimate objectives related to the ethical aspects and the integrity of the system, these rules can nevertheless be challenged in courts whenever they encroach on the rights of natural and legal entities. These rules are likely to affect the market in which the sporting contest is produced. They are certainly capable of affecting a number of different interests of individuals and entities that are subject to them, and it is within their rights to seek protection in Court or through European institutions. An assessment of the legality of these types of rules will weigh the importance of the interests at stake and the severity of the restrictions imposed by the league or association.

Another set of sporting rules aims instead at regulating the governance of the system: every sport federation or association will hence draft its own rules within the respective statute or regulation. Rather than defining the structure of the sport system, these rules range from providing a discipline for the use of regulatory powers by the sporting Associations,<sup>284</sup> to rules related to home and away matches<sup>285</sup> or ownership of the

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<sup>280</sup> See Foster, K, *Is there a global sports law*, in Siekmann, R.C.R. & Soek, J. (2012), *Lex sportiva: what is sports law?*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin, but also Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>281</sup> The legality of this type of rule under EU law has been challenged before the CJEU in the *Meca Medina* case. See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, [2006], ECR I-6991.

<sup>282</sup> Union of European Football Associations.

<sup>283</sup> See UEFA Club Licensing and Financial Fair Play Regulations, available at [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/28/41/2262841\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/28/41/2262841_DOWNLOAD.pdf)

<sup>284</sup> Examples of rules and conduct related to these aspects may be seen in cases such as *MOTOE* and *FIA*. See Case C-49/07, *MOTOE v. Elliniko Dimosio* (2008) ECR I- 4863, and the Press Release Commission closes its

clubs,<sup>286</sup> and rules regulating the contractual relationship between athletes and coaches and their respective clubs.<sup>287</sup>

A common objective underlying these first two categories of rules may be the need to preserve the uncertainty of the outcome of sporting events. However, by protecting the fairness of the contest and equal possibility for all the competitors, sporting bodies aim at preserving also a key commercial factor, related to how attractive and marketable their product is.<sup>288</sup> In light of their expertise, they are best placed to pursue this objective effectively.<sup>289</sup>

The impact that these rules can have on the competition and the players on the market is apparent even to the most casual observer. Indeed, they are likely to affect both the contest market, where the sporting contest is produced, and the supply market, where the production factor, the labour, is exchanged. They condition the conduct and the freedom of any entity or person economically active in the system, and may be challenged in Court for this reason.<sup>290</sup>

The commercial aspects related to this last set of rules are evidently more prominent than in the context of the ethical rules mentioned before. The profit-oriented nature of the regulations becomes the core element for the last category that will be taken into consideration. These are commercial rules, which regulate or anyway affect the market for the exploitation of the sports product in its different forms, such as broadcasting

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investigation into Formula One and other four-wheel motor sports. European Commission - IP/01/1523, 30/10/2001.

<sup>285</sup> This type of rule was considered in the *Mouscron* case. See the related press release ‘Limits to application of Treaty competition rules to sport: Commission gives clear signal’, European Commission, IP/99/965, 9 December 1999.

<sup>286</sup> A case involving rules regulating the ownership of professional football clubs, *ENIC*, has been decided by the Commission in 2002. See Case COMP/37 806: *ENIC/UEFA*.

<sup>287</sup> One of the main example in this regard may be taken from *Bosman*. See Case C-415/93, *Union des Associations Européennes de Football (UEFA) and others v Jean-Marc Bosman*, [1995] ECR I-04921.

<sup>288</sup> In *Meca Medina*, the Court of First Instance recognised the economic value that Governing bodies place on the perception of the fairness of the competition. See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities*, [2004] ECR II-03291, para. 57. Moreover see Szyszczak, E. (2007), *Competition and Sport*, European Law Review, 32, p. 95.

<sup>289</sup> See Foster, K, *Is there a global sports law*, in Siekmann, R.C.R. & Soek, J. (2012), ‘*Lex sportiva: what is sports law?*’, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>290</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011, citing *Walrave*, see *supra*, as the first example in which the Court of Justice of the European Union has clarified that governance rule that are capable of causing restrictions may not escape the analysis under EU law.

rights,<sup>291</sup> and ticket sales arrangements,<sup>292</sup> to name but a few. In relation to this last type of rules, their objective is clearly and merely commercial, and hence their connection with the peculiar nature of sport and its features is weak and deserves less consideration.

For the purposes of this research, the analysis has consciously excluded the rules of the game from this framework: each sport has its own technical rules and regulations, established by the international federations and applied throughout the whole sporting system. This set of rules is often referred to as *lex ludica*.<sup>293</sup> although they are in theory capable of having economic consequences, they tend to be considered unchallengeable, because they are necessary and inherent to the sporting activity itself.<sup>294</sup>

#### **4. The European Sport System**

As the focus of this research is expressly placed on the application of European Union law to sport, it seems logical to provide an overview of the European Sport system: its structure and characteristics will shape the framework into which the research will develop.

The European Model of sport is often referred to as a pyramid,<sup>295</sup> with the International Olympic Committee sitting at its top; progressively descending from it, the next levels are formed by the International Sporting Federations at global and continental level, the respective National Sporting Federations, the Associations, then the clubs, and finally

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<sup>291</sup> The theme of the commercialisation of sport broadcasting rights will be analysed in a separate chapter. See *supra*, chapter 5.

<sup>292</sup> An example of a Commission Decision involving the legality of ticket arrangements and distribution is Case 33384 and 33378, *Distribution of package tours during the 1990 World Cup*, OJ 1992 L 326/31.

<sup>293</sup> See Foster, K., *Lex Sportiva and Lex Ludica: The Court of Arbitration for sport's jurisprudence*, in Blackshaw, I., Siekmann, R., Soek, J., (2006), *The Court of Arbitration for Sport 1984 — 2004*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>294</sup> See the Court of Arbitration for Sport, holding that judicial power to review the application of these rules has to be limited to that which is arbitrary or illegal, or in violation of social rules or the general principles of law. See *Mendy v. IABA*; OG. Atlanta 006, paras 11 – 13.

<sup>295</sup> The same definition has been used by the Commission in the Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, at para. 3.4.

the players. At the bottom of the structure there are amateur level clubs and players, and in general grassroots sport.<sup>296</sup>

Within this general framework it is already possible to distinguish two main groups of entities, in light of their functions and objectives. The purpose of Amateur Clubs and Associations is intended to be limited to recreation and the development of young players, while Professional entities will have to operate also as commercial undertakings, having to balance the sporting objectives with the goal of maximising their profits.<sup>297</sup>

As mentioned, the pinnacle of the European model of sport is constituted by the International Olympic Committee.<sup>298</sup> The IOC operates as a quasi-state entity, with a sort of immunity status that makes it not triable in national courts by virtue of International Law.<sup>299</sup> The IOC presents the main characteristic necessary to have its international legal personality recognised,<sup>300</sup> such as the capacity of entering into legal agreements with States and other international organisations.

Furthermore, as a feature intrinsically connected with the pyramid structure, European sport is organised with a single national sport association per sport and Member State,<sup>301</sup> operating under the umbrella of a single European association and a single worldwide association.<sup>302</sup> Therefore, as opposed to the North American system, where professional team sports leagues are independent organisations with entry barriers, the

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<sup>296</sup> Andreff, W., Dutoya, J., Montel, J. (2009) *A European model of sports financing: under threat?*, *Revue Juridique et Economique du Sport* 90: 75-85. Available at <http://www.playthegame.org/news/news-articles/2009/a-european-model-of-sports-financing-under-threat/> [Last Accessed on 08/10/2015].

<sup>297</sup> See Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>298</sup> The International Olympic Committee, hereafter also IOC, is the supreme authority of the Olympic Movement that comprises a number of parties, including the National Olympic Committees (NOCs), the International Sports Federations (IFs), the athletes, and the Organising Committees for the Olympic Games (OCOGs).

<sup>299</sup> See Foster, K, *Is there a global sports law*, in Siekmann, R.C.R. & Soek, J. (2012), *'Lex sportiva: what is sports law?'*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin.

<sup>300</sup> In 2014 the IOC signed a cooperation agreement with the United Nations, available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/69/L.5](http://www.un.org/ga/search/view_doc.asp?symbol=A/69/L.5) [last accessed on 3/10/2015].

<sup>301</sup> Only one Association per country can be a member of the European or International Sporting Body. This structure has been accepted by the European Commission. See European Commission, *The European Model of Sport*, Consultation Document of DG X [September 2008].

<sup>302</sup> See the Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, at para. 3.4.



vast majority of European leagues are integrated in a hierarchical structure, with some level of interdependence between amateur and professional sport.<sup>303</sup> In particular, many European leagues are structured with a system of promotion and relegation of clubs between higher and lower leagues, and characterised by a certain degree of solidarity throughout the levels of the game.<sup>304</sup>

The pyramidal structure might cause concerns from an EU law perspective in several ways. First, International Sport Federations have a monopoly or quasi-monopoly power over the organisation of their respective sporting disciplines within Europe; while in principle this does not infringe competition law,<sup>305</sup> Federations may exercise their power over regulatory issues and in the exploitation of commercial rights. Moreover, the European Model of Sport divides the organisation and regulation of sport along national boundaries, an element that *per se* would be contrary to the objective of European integration, and to the notion of a EU single market.<sup>306</sup> One of the reasons for the development of such a type of structure can be seen in the approach that European States have taken towards sports organisations, historically allowed to function as independent bodies, whose internal organisation is left to its autonomy.<sup>307</sup>

Finally, the hierarchical governance system does not give proper account of the needs and rights of all the stakeholders of the industry. The commercialisation of the sector has increased the number of challenges that governments and stakeholders pose to the vertical authority exercised by Governing Bodies.<sup>308</sup> It is therefore necessary to move

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<sup>303</sup> Andreff, W. (2011), 'Some comparative economics of the organization of sports: competition and regulation in north American vs. European professional team sports leagues.' *The European Journal of Comparative Economics*. (1) p. 3.

<sup>304</sup> Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>305</sup> As seen before, *infra* Chap 2, § 6, EU law does not prohibit the constitution of a monopoly *per se*, but only the abuse of monopoly power. See Article 102 TFEU and Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy? : Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>306</sup> See Szyszczak, E. (2007), *Competition and Sport*, *European Law Review*, 32, p. 95.

<sup>307</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands and Geeraert, A. (2015), *The European sectoral social dialogue committee in professional football: power relations, legitimacy and control*, *Soccer & Society*, 16, 1.

<sup>308</sup> Geeraert, A. (2015), *The European sectoral social dialogue committee in professional football: power relations, legitimacy and control*, *Soccer & Society*, 16, 1.

towards a horizontal model of governance, whereby all the stakeholders can contribute to the policy setting and the decision-making process.

Although the monopolistic structure of the European sport system has been recognised in different circumstances by the Commission,<sup>309</sup> this is neither the only possible structure, nor is it strictly necessary for the functioning of the system. In the United States the sport system is not structured in a similar fashion,<sup>310</sup> and even in Europe some disciplines cannot be comprised under the Pyramid.<sup>311</sup> Accordingly, some of the characteristics of the system are limited only to certain categories of sport, and cannot be assumed to be relevant for the totality of disciplines.<sup>312</sup> Moreover, the emergence of European clubs and European leagues may in fact have diluted the validity of the notion of a European model strictly and exclusively divided along national lines.<sup>313</sup>

## 5. Sport Specificity and Consequences

In the context of the research on the application of competition law to sport, one of the most important elements to consider is the discussion of the specific characteristics of sport. In this regard it is important to identify which features of sport are so unique that may differentiate it from other industries, and how important these characteristics are when it comes to the application of competition law to sport.

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<sup>309</sup> See European Commission, White Paper on Sport, COM(2007) 391 Final, at para.4, and confirmed also in Kienapfel P, Stein A, (2007), *The Application of Articles 81 and 82 EC in the sport sector*, Competition Policy Newsletter 3: 6-14.

<sup>310</sup> Andreff, W. (2011), *Some comparative economics of the organization of sports: competition and regulation in north American vs. European professional team sports leagues*. The European Journal of Comparative Economics. (1) p. 3.

<sup>311</sup> See the examples of Golf and Formula one to name but a few. See Pijetlovic, K. (2015) *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands. Also in its White Paper, immediately after the recognition of the European Model, the Commission maintains that it is unrealistic to define a unified model of organisation of sport in Europe. See European Commission, *White Paper on Sport*, COM(2007) 391 Final., at para.4.

<sup>312</sup> Lewis, A. & Taylor, J. 2014, *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>313</sup> See Gardiner, S., *Characteristics of Sport Business*, in, Gardiner, S., O'Leary, J., Welch, R., Boyes, S. & Naidoo, U. (2012) *Sports law / Simon Gardiner ...* [et al.]. Abingdon; New York: Routledge, 2012; 4th ed, p.223. Moreover, it is argued that after *Bosman* professional clubs and players have abandoned their marginal position at the bottom of the pyramid. See Garcia, B. and Meier, H. (2012) *Limits of Interest Empowerment in the European Union: The Case of Football*, Journal of European Integration, 34/4, p. 360.

In general terms, one important aspect that has to be taken into consideration is the interdependence between the sporting activity, with its social and cultural importance,<sup>314</sup> and the economic activity it generates.<sup>315</sup> In this sense, the analysis is further complicated by the fact that sport exists both as a mere leisure activity, and as a commercial and profit pursuing enterprise.<sup>316</sup> The issue arises when it has to be considered that any aspect related to sport may also be seen in an economic perspective.<sup>317</sup> It is therefore difficult to sever the economic aspects from the sporting ones, as any rule is capable of exerting a certain economic impact.<sup>318</sup>

The relationship between these facets is a delicate one: as the passion associated with team sport competitions is capable of overriding commercial needs and objectives, fans tend to weigh trophies and success on the pitch more highly than economic achievements. Sporting entities need to commercialise their products and brands without losing the nature of sport and the perception that fans must have of the integrity of the game.<sup>319</sup> Where leagues and clubs fail to effectively pursue both aims, they will either be unable to survive commercially, or they will lose their fan base and main customers.

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<sup>314</sup> The social significance of sport, and in particular its role in forging the European identity and bringing people together has been emphasised also within the Declaration on Sport attached to the Amsterdam Treaty. See the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations adopted by the Conference - Declaration on sport, OJ C 340, 10/11/1997. The social importance of Sport has been recognised also by the Court of Justice in its seminal *Bosman* ruling, at para. 106.

<sup>315</sup> See Siekmann, RR. (2008) *Is Sport 'Special' in EU Law and Policy?*, in: Roger Blanpain (Ed.), *The Future of Sports law in the European Union - Beyond the EU Reform Treaty and the White Paper*, Alphen aan den Rijn, pp. 37-49. The multifaceted nature of sport has been recognised also by the Commission. See Kienapfel P, Stein A, (2007), *The Application of Articles 81 and 82 EC in the sport sector*, Competition Policy Newsletter 3: 6-14.

<sup>316</sup> In this regard, some authors draw a comparison with other sectors that present this dual side as well, such as cultural services in general and theatre, art, music, health care and education. See Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13.

<sup>317</sup> As it was recognised even by the Court of Justice in *Bosman*, at para.76 and *Meca Medina*, at para. 26.

<sup>318</sup> See Case C-415/93, *Bosman*, [1995] ECR I-04921, para. 76, and Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>319</sup> See Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13. This aspect has been also recognised by the Court of Arbitration for Sport in CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), award of 20 August 1999, at para. 25, and in the related Commission Decision Case COMP/37 806: ENIC/ UEFA, at para. 20.

The combination of the cultural and the commercial aspects of sport is reflected as well on the way it is financed. Sports financing may take the form of subsidies granted to sport federations and clubs, or funding for the building or renovation of sport infrastructures, or the creation of paid jobs in the sector. But the financing may also be distinguished in relation to the function of sport and the level of participation it attracts: from leisure and health sport practice, to amateur sport contests, to high level sport. Different sources of funding tend to be directed towards specific categories: therefore, enterprises and governments privilege high level sport, that guarantees high media exposure in return, while local communities will prefer to grant support to amateur sports, and finally household expenditures will be geared towards leisure and health practice.<sup>320</sup> This differentiation, and its impact on the level of funding available to each category, is a further threat to the pyramidal model of the European sport system, while vertical solidarity should be used to address this concern.

The societal importance of sport, and the need to preserve its educational, public health, social, cultural and recreational functions<sup>321</sup> cannot be stressed enough, especially in light of the consideration that has to be granted to the public interest in the application of competition law.<sup>322</sup> In this regard, social advantages may also be related to the process by which local communities and citizens identify themselves and feel represented by local teams, clubs or even individual athletes.<sup>323</sup> Moreover, at grassroots

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<sup>320</sup> Andreff, W., Dutoya, J., Montel, J. (2009) *A European model of sports financing: under threat?*, Revue Juridique et Economique du Sport 90: 75-85. Available at <http://www.playthegame.org/news/news-articles/2009/a-european-model-of-sports-financing-under-threat/> [Last Accessed on 08/10/2015].

<sup>321</sup> These characteristics have been recognised by the European Commission as well in its White Paper on Sport. See European Commission, *White Paper on Sport*, COM(2007) 391 Final, at para 2 *et seq.* Furthermore, in the Report of the Commission on the Transfer system it was also argued that the autonomy and self-regulation ability granted to sporting bodies represent a fundamental characteristic of sport, in comparison with other economic and social activity. See European Commission, KEA – CDES: Study on the Economic and Legal Aspects of Transfers of Players, 7 February 2013, at p. 1.

<sup>322</sup> See only as an example Article 7 of the Council Regulation (EC) No 1/2003, whereby restrictive conduct may be exempted from the application of Article 101 TFEU if the exemption is considered to be in the public interest.

<sup>323</sup> Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13

level sporting activities are mostly carried out by volunteers, thereby helping the development of the respective sport and the promotion of fair values.<sup>324</sup>

### 5.1. The Characteristics of Sport

There are a number of characteristics of the sport system which are immediately intuitive and may represent an important element of differentiation with industries operating in other commercial sectors. Participants in a sporting competition are usually divided in relation to their gender and sometimes their nationality. This is a clear and direct form of discrimination, but it is considered to be necessary for the functioning of the system.<sup>325</sup> However, notwithstanding the relevance of this consideration, this analysis has to focus on the aspects that are more related to the framework of competition law. In this regard, one of the main characteristics of the sport system is the need for cooperation between competitors. There is no competition without two or more teams, or two or more athletes, and any sporting organisation cannot have meaningful existence without competitors.<sup>326</sup> Moreover, the different actors on the market, whether clubs or athletes, have to agree on the practical organisation of the competition. Indeed, this requires the fixing of dates, locations and time to schedule the events: collusive conduct may therefore be considered as a natural consequence of mutual interdependence.<sup>327</sup>

In any other economic sector a successful company strives to eradicate its competitors from the market, as this will increase the demand for its product, and ultimately allow it to acquire a monopoly power.<sup>328</sup> In the sporting context, this type of conduct would

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<sup>324</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>325</sup> See as an example in the United Kingdom the Equality Act 2010, S195 dealing with Sporting exception. For a reference from the Court of Justice see *Walrave*, where the Court held that rules on nationality of members of team may not fall under EU law. See Case 36/74, *B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale*, [1974], ECR 1974 -01405.

<sup>326</sup> Beech, J. G. & Chadwick, S. (2012) *The business of sport management*. Harlow: Financial Times/Prentice Hall, 2012; 2nd Ed.

<sup>327</sup> Beech, J. G. & Chadwick, S. (2012) *The business of sport management*. Harlow: Financial Times/Prentice Hall, 2012; 2nd Ed.

<sup>328</sup> However, a comparison may be drawn with the banking sector. To a certain extent, banks tend to depend on each other through the credit system.

imply the failure of the competition and even the dominating undertaking itself would not be able to operate on the market anymore, as there would be no market.<sup>329</sup> This concept cannot be limited only to a situation of monopoly: even the position of dominance held by a club or a small number of clubs is capable of having adverse effects on the whole product.<sup>330</sup>

Sporting clubs and associations, indeed, have as the main focus of their activity the production of the sporting event. The event constitutes in itself the product of the industry, and as such it has to be organised, and sold on the market. In this perspective, the product of a league is the game: this has to attract the interest of consumers, and it has to be integrated within the framework of a competition in order to achieve that objective.<sup>331</sup> This represents a main difference with other industries: in sport there is a demand for the contest in its own right, and only subsequently a derived demand related to the specific outcome of the contest. Hence, the competition between companies is not a characteristic of the market, at least not in a first instance, but rather an inherent element of its product.<sup>332</sup> This explains the value attached to the fairness of the competition, or better to the perception of fairness that consumers must have.

Consumers value the competition and interaction between teams, with less attention given to one single player. The quality of the product will be determined by the quality of those involved in the event.<sup>333</sup> From an economic perspective, winning the competition is important only to the extent that it guarantees more streams of revenue, and ultimately more success on the market for broadcasting rights, sponsoring rights

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<sup>329</sup> In particular, this aspect has been recognised also by the Advocate General Lenz in his opinion in *Bosman*. See Case C-415/93, *Union des Associations Européennes de Football (UEFA) and others v Jean-Marc Bosman*, [1995] ECR I-04921, Opinion of AG Lenz, para 227.

<sup>330</sup> See Gardiner, S., *Characteristics of Sport Business*, in, Gardiner, S., O'Leary, J., Welch, R., Boyes, S. & Naidoo, U. (2012) *Sports law* / Simon Gardiner ... [et al.]. Abingdon; New York: Routledge, 2012; 4th ed, p.223.

<sup>331</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>332</sup> Papaloukas, M. (2005) *Sports Law and Sports Market*, *Choregia* 1 (1-2) pp. 39-45.

<sup>333</sup> Rosen, S., & Sanderson, A. (2001). *Labour Markets in Professional Sports*. The Economic Journal, 111(469), F47-F68. However, this statement is valid only in relation to the event as main product, while all the other commercial activity related to individual teams (merchandising, marketing, etc.) are produced, marketed and sold with no regard to competitors.

and merchandising.<sup>334</sup> In turn, these represent areas of derived demand, where the content is distributed to broadcasters, and the sporting contest constitutes a vehicle for gambling activities, or for marketing purposes.<sup>335</sup>

The competition is the main essence of sport, and its main feature is the uncertainty of the outcome. There cannot be competition where the result is already known.<sup>336</sup> Respecting and protecting the uncertainty of the outcome includes the need to preserve the integrity of the competition, against conduct running against the notion of fair play.<sup>337</sup> But the objective may also refer to the need to ensure that there is a certain degree of equality between competitors: an event whose result is uncertain and balanced is likely to attract a higher number of consumers.<sup>338</sup> The uncertainty may be related to the result of a single match, or to the final outcome of the championship. If we translate this concept into economic considerations, Kesenne has argued that only the uncertainty related to the final result of the championship is capable of affecting the interest of spectators.<sup>339</sup> However, the real significance of the impact of the uncertainty element on fan demand may be questioned.<sup>340</sup>

## 5.2 Sporting Practice v. Economic Activity

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<sup>334</sup> However, traditionally the European sport system adopts a win maximisation objective, as opposed to the profit maximisation goal adopted in the North American system. See Andreff, W. (2011). *Some comparative economics of the organization of sports: Competition and regulation in North American vs. European professional team sports leagues*. *The European Journal of Comparative Economics*, (1), 3.

<sup>335</sup> Szymanski, S. (2003). *The Assessment: The Economics of Sport*. *Oxford Review of Economic Policy*, 19, 4, 467-477.

<sup>336</sup> However, rather than this factor in itself, the main element that Sporting Federations seek to protect is the perception of the audience that the outcome of a competition is uncertain. See ENIC, Case COMP/37 806: ENIC/ UEFA, Brussels D(2002), para. 3.

<sup>337</sup> These include match fixing, doping, illegal betting and any conduct that may alter the fairness of the competition.

<sup>338</sup> A concept known as competitive balance. See Budzinski, O. (2011), *The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets*. University of Southern Denmark Department of Environmental and Business Economics - Markets and Competition Working Paper No. 2011-0124.

<sup>339</sup> Kesenne, S. (2000). *Revenue sharing and competitive balance in professional team sports*. *Journal of Sports Economics*, 1, pp. 56–65.

<sup>340</sup> Szymanski has affirmed that there is no empirical evidence that the uncertainty of the outcome is a significant determinant of fan demand. See Szymanski, S. (2003) *The economic design of sporting contests*. *Journal of Economic Literature*, 41, 1137–1187.

Sport exists as a leisure and recreational activity, but also as a profit-making enterprise,<sup>341</sup> with the presence of an institutionalised competition as the key characteristic distinguishing the two.<sup>342</sup>

Accordingly, the activities that sports associations carry out may be distinguished in the setting and subsequent implementation of sporting rules, and in the conduct of business activity. Genuine sporting rules would likely regulate the game, the schedule and structure of the competition and disciplinary matters, all aspects that are necessary to guarantee the functioning of sport. However, although being sporting rules, they may have been established with the aim of enhancing the attractiveness of the competition and the events, thereby increasing the number of fans and revenues, and ultimately pursuing an economic objective.<sup>343</sup>

Hence, one of the characteristics of the sporting system is the manifold and intertwined nature of the activities that clubs, sporting bodies and athletes have to undertake. Indeed, they all have to carry out a number of activities with the aim of succeeding on the sporting pitch, but they also actively promote and sell their product on the market. Clubs in particular, as any other commercial enterprise, have to generate revenues by selling their own product to the fans, paying customers. In order to do that, they engage in a range of activities that may comprise advertising, marketing and promoting their brand, as well as investing in facilities and infrastructures that allow them to distribute their product efficiently.<sup>344</sup>

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<sup>341</sup> This is not an exclusive characteristic of the sporting sector though, as it may be observed also in other areas such as culture, art and theatre, to name but a few. See Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13.

<sup>342</sup> Shilbury, D. (2012). *Competition: The heart and soul of sport management*. Journal of sport management: the official journal of the North American Society of Sport Management, 26(1).

<sup>343</sup> Budzinski, O. (2011), *The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets*. University of Southern Denmark Department of Environmental and Business Economics - Markets and Competition Working Paper No. 2011-0124.

<sup>344</sup> Kuper, S., & Szymanski, S. (2012). *Soccernomics: Why England loses, why Germany and Brazil win, and why the U.S., Japan, Australia, Turkey and even Iraq are destined to become the kings of the world's most popular sport*. New York: Nation Books.



The sport system does not operate according to an efficient business model,<sup>345</sup> but it is able to subsidise a number of losses with periods of financial rewards.<sup>346</sup> The traditional economic approach towards sport argues that in Europe teams and sporting bodies pursue the objective of winning on the field, as opposed to maximise the profits on the market.<sup>347</sup> This may represent an inner difference between the European and North American sport system, which could arguably be seen as a consequence of the structures adopted within the two systems, and the level of regulation imposed therein.<sup>348</sup> Indeed, the closed league structure adopted by the North American system represents a cartel, capable of maximising the profits of the participants.<sup>349</sup> Conversely, in Europe teams tend to adopt a winning maximisation objective, aiming at being promoted or winning the championship, or avoiding the threat of relegation, even at the cost of carrying out non-efficient conduct under an economic perspective.

The choice of pursuing a win-maximisation objective rather than a profit-maximisation one has consequences on the sporting labour market as well. Under the win-maximisation approach, teams will seek to recruit as much talent as possible within their budget constraint. The market for sport players in Europe has also been affected by the judgment in *Bosman*,<sup>350</sup> where the Court of Justice held that the system of player registration, which was restricting the freedom of movement of workers within the EU,

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<sup>345</sup> See Kuper, S., & Szymanski, S. (2012). *Soccernomics: Why England loses, why Germany and Brazil win, and why the U.S., Japan, Australia, Turkey and even Iraq are destined to become the kings of the world's most popular sport*. New York: Nation Books, p.58.

<sup>346</sup> See Gardiner, S., *Characteristics of Sport Business*, in, Gardiner, S., O'Leary, J., Welch, R., Boyes, S. & Naidoo, U. (2012) *Sports law / Simon Gardiner ...* [et al.]. Abingdon; New York: Routledge, 2012; 4th ed, p.223.

<sup>347</sup> This theory has been originally postulated in 1971, see Sloane, P., (1971), *The Economics of Professional Football: The Football Club as a Utility Maximiser*, Scottish Journal of Political Economy, 18, issue 2, p. 121-46. It may therefore be appropriate to question whether it is still applicable. See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>348</sup> While the vast majority of European Leagues adopt an open model, with promotions and relegations, in US leagues are closed, with a limited number of franchises that may be relocated in the pursuit of better commercial conditions. See, amongst the others, Andreff, W. (2011), 'Some comparative economics of the organization of sports: competition and regulation in north American vs. European professional team sports leagues.' The European Journal of Comparative Economics. (1) p. 3.

<sup>349</sup> Kesenne, S. (2007) 'The Peculiar International Economics of Professional Football in Europe' Scottish Journal of Political Economy. 54 (3) pp. 388-399.

<sup>350</sup> Case C-415/93, *Union des Associations Européennes de Football (UEFA) and others v Jean-Marc Bosman*, [1995] ECR I-04921.

was illegal. The ruling and its consequences<sup>351</sup> have arguably freed the market for sporting players.<sup>352</sup> This is in sharp contrast with the traditional description of the market for sports product, still nationally framed. This conclusion, however, is the outcome of a short-sighted vision, that does not take into account the increasing Europeanisation of sport,<sup>353</sup> especially in relation to some disciplines and some products, that are now marketed on a European and global scale.<sup>354</sup>

The next two sections will therefore give account of both the sport labour market and the product market, as their characteristics are important in the context of the specificity of sport.

### 5.3 Sporting Labour Market

As mentioned before, sport has an ephemeral nature. This characteristic is not only related to the product of the industry, but it also affects the labour side. In general, individual sportspersons tend to have short careers, in comparison with other industries. Furthermore, their career may be subject to a number of interruptions and abrupt termination due to injuries or other circumstances.<sup>355</sup>

Although the discussion of the labour market is not the main aim of this research, the restrictions imposed on it may still be relevant under a competition law perspective.

Indeed, the hierarchical structure of the sport system grants Sports Governing Bodies a

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<sup>351</sup> After the ruling, FIFA had to amend its regulations and abolish the payment of transfer fees for players who were EU nationals and who moved cross border in the EU territory on expiry of their contracts. See Garcia, B., (2011), *The informal agreement on the international transfer system*, European Sports Law and Policy Bulletin, I-2011, pp. 17-29.

<sup>352</sup> Kesenne, S. (2007) *'The Peculiar International Economics of Professional Football in Europe'* Scottish Journal of Political Economy. 54 (3) pp. 388-399. However, this is hardly the case, as the system was able to adjust to the effects of the judgment. See Parrish, R., (2015), *Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law*, Maastricht Journal of European and Comparative Law, 22(2) 256-282. See also in relation to this the complaint filed in 2015 with the Commission by the FIFPro, representing football player worldwide, against the FIFA transfer system. See <http://www.fifpro.org/en/news/fifpro-takes-legal-action-against-fifa-transfer-system?highlight=WyJjb21wbGFpbnQiXQ==>.

<sup>353</sup> See Gardiner, S., *Characteristics of Sport Business*, in, Gardiner, S., O'Leary, J., Welch, R., Boyes, S. & Naidoo, U. (2012) *Sports law* / Simon Gardiner ... [et al.]. Abingdon; New York: Routledge, 2012; 4th ed.

<sup>354</sup> See as an example the judgment of the Court of Justice in *Murphy*, holding that territorial exclusivity in the commercialisation of sport broadcasting rights infringes EU law, as it divides the market along national lines. See *infra* Chap. 6, § 3.1.3.

<sup>355</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

degree of control over the sporting labour market, which is likely to carry along restraints in wages and freedom of players and clubs. Ultimately, these restrictions can cause harm to consumers as well, when players are allocated to teams in a suboptimal way, thus lowering the overall quality of the product offered.<sup>356</sup> Hence, in the context of this analysis it is important to give account of the features of the labour market in the sporting industry as well.<sup>357</sup>

While it can be argued that in the U.S. the sport labour market is closed,<sup>358</sup> with restrictions such as the reserve clause,<sup>359</sup> salary caps and the draft system resulting from collective bargaining agreements between players and employers, the same cannot be said in relation to the European system. In a monopsony like the U.S. sport system labour market,<sup>360</sup> the closed nature of the leagues allows them to maintain the wages of players at a level which is lower than what would have been possible in a competitive marketplace.<sup>361</sup> On the other hand, the sport labour market in Europe is open:<sup>362</sup> it faces a very high degree of international player mobility, as opposed to the product market which is still closed and nationally protected. This represents a further element of differentiation from the vast majority of industries in the context of the European Union, where the labour market is generally characterised by high development of international trade and mobility of capitals, while comparatively immobile in relation to workers' mobility.<sup>363</sup> As opposed to closed leagues, where the working conditions of players are set through collective bargaining between clubs owners and players' union,

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<sup>356</sup> Ross, S. F. (2003). *Competition Law as a constraint on Monopolistic Exploitation by Sport Leagues and Clubs*, Oxford Review of Economic Policy, 19(4), 569–584.

<sup>357</sup> A further analysis of the rules and regulations of the sports labour market that are capable of distorting the competition is provided in a separate chapter. See *infra*, *Competition Law in the Sports Labour Market*.

<sup>358</sup> Wong, G. M. (2010) *Essentials of Sports Law*. Santa Barbara, Calif: Praeger.

<sup>359</sup> The clause establishes that a team could decide to retain a player even after the expiration of his contract, was in force in the MLB until the 1970 when it has been abolished for the veteran players, although it is still applied to players with less than 6 years of career in the League.

<sup>360</sup> A Monopsony defines a market with one single buyer. It indicates a state where demands come from one source. If there is one main employer in a certain industry and many workers seek to gain employment, the former will have the power to set conditions and wages. See Boal, W. and Ransom, M., (1997) *Monopsony in the Labor Market*, Journal of Economic Literature, Vol. 35, No. 1 (Mar., 1997), pp. 86-112.

<sup>361</sup> Beech, J. G. & Chadwick, S. (2012) *The business of sport management*. Harlow: Financial Times/Prentice Hall, 2012; 2nd ed.

<sup>362</sup> As a consequence of the ruling in *Bosman*. See *infra*.

<sup>363</sup> Kesenne, S. (2007) *'The Peculiar International Economics of Professional Football in Europe'* Scottish Journal of Political Economy. 54 (3) pp. 388-399.

within Europe the role of collective bargaining is still fairly limited and less formalised.<sup>364</sup> This aspect is particularly relevant, as collective labour agreements may escape the application of Article 101 TFEU, in light of the social policy objectives that they pursue.<sup>365</sup>

This description of the European sport labour market is related to the so called post-*Bosman* era: the seminal judgment has carried along an element of deregulation of the labour market for players, who were then allowed to respond to market incentives. The greater international mobility brought about as a consequence, coupled with a higher level of commercialisation of sport, has led to greater competitive dominance by a small pool of big-market teams.<sup>366</sup> Furthermore, the judgment in this case has particular importance in relation to the recognition of another characteristic of the sport product market, such as the need to encourage the development of young athletes and the protection of minors.<sup>367</sup> Indeed, in other industries it is given less importance and there is less protection for these needs.<sup>368</sup>

The structure and conditions of the labour market have consequences on the quality of the competition as well. Teams from small countries have to compete with European dominant counterparts on a free labour market, while their ability to collect revenue is constrained by a product market that is nationally closed.<sup>369</sup>

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<sup>364</sup> See Andreff, W. (2011), 'Some comparative economics of the organization of sports: competition and regulation in north American vs. European professional team sports leagues.' *The European Journal of Comparative Economics*. (1) p. 3. However, the Social Dialogue instituted within the European Union represents a useful forum to discuss about collective bargaining in European sports. See Siekmann, R.C.R. (2013), 'Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states', Shaker Verlag, Aachen, and Parrish, R. (2011), *Social Dialogue in European Professional Football*, *European Law Journal*, vol. 17, no. 2, pp. 213-229.

<sup>365</sup> See Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025.

<sup>366</sup> See Jeanrenaud, C. & Késenne, S. (2006), *The economics of sport and the media*, Edward Elgar, Cheltenham.

<sup>367</sup> See *Bosman*, para. 106. The need was also cited in other cases, such as *Bernard*, para. 39. See Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010], ECR I-02177.

<sup>368</sup> See Weatherill, S. (2000), *Resisting the Pressure of Americanization: The Influence of European Community Law on the European Sports Model*, *Williamette Journal of International Law & Dispute Resolution*, 8, 37.

<sup>369</sup> This consideration is related to the concept of competitive balance, which Leagues and Association claim to pursue through restrictive arrangements.

Another feature that the literature has stressed in this regard is the ability of evaluating the performance of the employees: athletes are exposed to a level of scrutiny significantly higher than in other industries, and their contribution to the success of the group may be assessed in clear terms.<sup>370</sup> While the typical employment relation is affected by an asymmetry of information, the abilities of players are well known to the market, and any employers, both present and possible future ones, can evaluate their productivity.<sup>371</sup>

#### 5.4 Sporting Product Market

Sport is a heterogeneous and transient experience: its product, the event, is extremely perishable. Indeed, a sporting event is attractive on the market only before it has taken place and during the course of it. Once its result is known, the value sinks irremediably. This characteristic affects the exploitation of the products, as sport broadcasting must take place simultaneously to the event, and sport betting is a time-restricted activity.<sup>372</sup> In light of the weaknesses of the original product, organisers and players active on the market must compensate any eventual losses from direct revenues by seeking more stable sources of income, usually through the commercialisation of brands associated with clubs, players or events.<sup>373</sup>

On one hand, the need to protect the value of sporting events might explain the attention that sporting bodies devote to preserve the uncertainty of the outcome of competitions and its perception by sport fans and consumers.<sup>374</sup> This objective

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<sup>370</sup> Chadwick, S. (2009) *'From outside lane to inside track: sport management research in the twenty-first century'* Management Decision. 47 (1) pp. 191-203.

<sup>371</sup> Szymanski, S. (2003). *The Assessment: The Economics of Sport*. *Oxford Review of Economic Policy*, 19, 4, 467-477.

<sup>372</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>373</sup> These are however related market. Sport is considered a multisided market where the competition is the subject of market interactions, in relation to activities such as ticket selling, broadcasting and merchandising. See Dietl, H. M., Duschl, T., Franck, E. P. and Lang, M. (2010), *A Contest Model of a Professional Sports League with Two-Sided Markets*. University of Zurich - Institute for Strategy and Business Economics - Working Paper No. 114.

<sup>374</sup> The protection of this aspects has been considered the base for Decisions of the Commission exempting restrictive agreements. See Case COMP/37 806: ENIC/ UEFA.

underlies rules and regulations that aim to fight doping, match-fixing and other forms of unfair practices, but also rules on the ownership structure of clubs and players.

On the other hand, sporting bodies strive to protect the uncertainty of the outcome of the competition by enhancing the competitive balance within the league, through forms of solidarity mechanisms and sharing of revenues aimed at levelling the playing field.<sup>375</sup> This may be seen as a unique feature of sport, as in any other industry companies will refuse to share part of their profits with competitors, and with other players operating at lower level, unless as a form of voluntary activity related to social responsibility.<sup>376</sup>

In relation to the product market, a distinctive characteristic of the sport system is the impossibility to increase the production over an established limit, as opposed to what other sectors may do.<sup>377</sup> Only a certain number of games may be scheduled and offered on the market, due to the natural physical constraints to which players are subject, and in light of the seating capacity of the venues hosting the events. In turn, the fact that the number of events scheduled and marketed is limited at the source, immediately implies a first restriction imposed to the product market, and those active on it. The industry is indeed not capable of producing and supplying a number of sporting events within the same discipline over a certain limit, without undermining the efficiency of the system.<sup>378</sup> It is not possible to store the sporting product in order to sell it on another day.<sup>379</sup> Where the supply exceeds the demand, as unsold tickets could be considered in this case, the loss that the system will have to bear will not be recovered. However, this approach may be compared to the one adopted in relation to the luxury industry, where, by limiting the production and supply of the product, the brand will build or maintain its exclusive appearance and captivate the interest of consumers.

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<sup>375</sup> It is considered that a balanced competition will attract consumers.

<sup>376</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>377</sup> Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13.

<sup>378</sup> Dietl, H. M., Fort, R. and Lang, M. (2011), *International Sports League Comparisons*. University of Zurich Institute for Study and Business Economics, Working Paper No. 144.

<sup>379</sup> Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13.

Another main characteristic of the sport product is that it attracts the irrational passions of fans, commanding an uncommon high level of loyalty and allowing them to boost the self-esteem through vicarious identification.<sup>380</sup> The strong identification existing between the product and its consumers has as its consequence a low cross-elasticity of demand for the product itself.<sup>381</sup> Hence, a specific sporting event cannot be easily replaced by another one; this may be true in an intra-market perspective, where a football fan is unlikely to turn to another sport as a substitute. But it is obviously applicable within the same sporting discipline as well: accordingly, an underperforming team may still retain its fans against a better performing one. However, this consideration is only applicable to hard-core fans of a team. In the array of sport consumers there are not only passionate and fanatical fans, and not all of them identify themselves with their favourite players and teams. Their loyalty can vary as their attendance, and the interest can be erratic, depending on the quality of the event, the competitive balance and the presence of anti-competitive behaviour.<sup>382</sup> Similarly, the attachment mechanism described above may not be exclusive to sport fans. As sport consumers seek personal and emotional benefits through their favourite athletes and clubs, others may rely on discretionary leisure and luxury products to pursue the same aims.<sup>383</sup>

Finally, the product market in the sporting industry may be defined as a natural monopoly, with a single seller, a unique product and barriers that restrict the entry into the market.<sup>384</sup> The system may therefore need a regulatory structure that takes into account this aspect, and consider also the tendency of a private monopoly to ignore

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<sup>380</sup> See *idem*, p. 5.

<sup>381</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut. As mentioned before, this concept measures whether consumers would consider other products as substitutes of the one offered, would its price be increased. See *supra*, Chap.2, § 4.3

<sup>382</sup> Kuper, S., & Szymanski, S. (2012). *Soccernomics: Why England loses, why Germany and Brazil win, and why the U.S., Japan, Australia, Turkey and even Iraq are destined to become the kings of the world's most popular sport*. New York: Nation Books, p. 42.

<sup>383</sup> Smith, A. C. T. & Stewart, B. (2010), *The special features of sport: A critical revisit*, Sport Management Review (Elsevier Science). 13 (1) pp. 1-13.

<sup>384</sup> See Gardiner, S., *Characteristics of Sport Business*, in, Gardiner, S., O'Leary, J., Welch, R., Boyes, S. & Naidoo, U. (2012) *Sports law / Simon Gardiner ...* [et al.]. Abingdon; New York: Routledge, 2012; 4th ed.

issues of public interest.<sup>385</sup> In this sense, one of the main questions is whether competition law represents an appropriate instrument to ensure the pursuit of objectives that cannot be limited to the mere economic interest of the natural monopoly, but have to take into account the societal role of sport as well.

## **6. EU Sports Policy**

After having discussed the different categories of sporting rules and the main characteristics of the sport system, it is appropriate to mention also the way the institutions of the European Union have set their policy in this regard. In particular, this section aims at shedding some light on the approach that the institutions have adopted towards the theme of sports specificity: hence, it will provide an overview of the most important measures and try to highlight their impact. This discussion will therefore be extremely useful in the context of the analysis that will be carried out in the remaining sections of the thesis.

The policy measures set the objectives and the line of activity that the institutions will follow. It is therefore important to notice which institutions have adopted a particular measure and its significance in the context of this research. In a chronological order, the first document that has to be mentioned is the Adonnino Report. In 1985 the Council issued a report prepared by an ad hoc Committee ‘On a people’s Europe’,<sup>386</sup> in response to a perceived crisis of European integration.<sup>387</sup> This report had the aim of encouraging the development of a European consciousness that would extend over national ones and increase participation of citizens in the political process of the Union. In this perspective, the report emphasised the societal role of sport, and its ability to represent a forum for communication among people and an instrument to foster the

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<sup>385</sup> See Feintuck, M., (2004), *The Public Interest in Regulation*, Oxford: Oxford University Press.

<sup>386</sup> The ‘Adonnino Report’ - Report to the European Council by the ad hoc committee ‘On a People's Europe’, A 10.04 COM 85, SN/2536/3/85.

<sup>387</sup> Parrish, R. (2003), *The politics of sports regulation in the European Union*, Journal of European Public Policy, vol. 10, no. 2, pp. 246-262.



image of the Union, through the promotion of events, teams and emblems representing the Community.<sup>388</sup>

Nine years later, the European Parliament adopted a Resolution on the Community and Sport<sup>389</sup> inviting institutions, Member States and Governing Bodies to eliminate possible obstacles to the freedom of participation of Community citizens to sport, and to abolish any discrimination based on citizenship.<sup>390</sup> On a similar note, the Resolution of the Parliament in 1997<sup>391</sup> acknowledged the social importance of sport within the European Union<sup>392</sup> and stressed the independence of the sport movement. Moreover, the Resolution highlighted how the economic activity offered by professional sports could not escape *tout court* from the application of the law.<sup>393</sup>

The Treaty of Amsterdam of 1997 included a Declaration on Sport,<sup>394</sup> reaffirming the social significance and importance of sport. It represented an attempt to discuss the special status of sport,<sup>395</sup> as it called on the institutions of the Union to listen to sport associations in relation to important questions affecting sport, and to give consideration to the characteristics of amateur sport. The Declaration, however, lacked legal strength, as it did not establish any legal competence in relation to sport. Furthermore it did not result in an exemption from the application of EU law either.<sup>396</sup> Regardless, its impact has been significant, both in political terms, as the Council has started to discuss sport

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<sup>388</sup> See the Adonnino Report, para. 5.9.1.

<sup>389</sup> See Report on the European Community and Sport, Rapporteur: Mrs. J. Larive. A3-0326/94/ Part A (27/4/94) Part B (29/4/94).

<sup>390</sup> See Smokvina, V., in Siekmann, R.C.R. (2013), *'Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states'*, Shaker Verlag, Aachen.

<sup>391</sup> A4-0197/97. Report on the Role of the European Union in the Field of Sport (28/5/97). Rapporteur: Mrs. D. Pack.

<sup>392</sup> See para. 1 of the Pack Report. However, the report also held that at the time of writing these aspects did not receive enough attention by the institution. See Recital I of the Report.

<sup>393</sup> See Para.3 of the Pack Report.

<sup>394</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations adopted by the Conference - Declaration on sport, OJ C 340, 10/11/1997.

<sup>395</sup> See Smokvina, V., in Siekmann, R.C.R. (2013), *'Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states'*, Shaker Verlag, Aachen.

<sup>396</sup> See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy? : Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

issues more frequently, and in relation to the Decision practice of the Commission<sup>397</sup> and the case law of the Courts.<sup>398</sup>

Subsequently, the Commission has adopted a Consultation Document, entitled ‘The European Model of Sport’,<sup>399</sup> where it described the structure and the organisation of the European Sport system, and it outlined the features of sport.<sup>400</sup> In the second section, the document discussed the relationship between sport and television, maintaining that free access on television to major sporting events should be protected as falling under the right of information.<sup>401</sup> The Document finally addressed the societal importance of sport, and its role in the field of education, health, environment and employment.

Recalling the societal value of Sport as recognised by the Declaration annexed to the Amsterdam Treaty, the European Council invited the Commission to submit a report with a view to safeguard the structure of sport and its social and educational function. In 1999 the European Commission adopted the Helsinki Report,<sup>402</sup> aiming to reconcile the economic dimension of sport with its social and education nature. The Commission stressed how the development of sport, in terms of popularity, economic dimension and internationalisation is capable of providing advantages, but may also cause concerns.<sup>403</sup>

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<sup>397</sup> See i.e. *infra* *State Aid* chapter, § 5.2, the discussion about State aid cases, where the Commission has cited the Declaration to affirm the social importance of sport.

<sup>398</sup> See i.e. Case C-51/96, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* [2000], ECR I-02549, para. 42, and Siekmann, R.C. (2012) *Introduction to International and European Sports Law – Capita Selecta*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, p. 73.

<sup>399</sup> European Commission, *The European Model of Sport*, Consultation Document of Directorate-General X, 1998.

<sup>400</sup> The Document stressed the importance of these features, and how they should be taken into account for the future development of sport in Europe. See para. 1.3.

<sup>401</sup> See para. 7. This statement, however, confirms the premise of the Directive 89/552/CEE, also known as ‘Television Without Frontiers’ amended by the Directive Audiovisual Media Services, no.2010/13/EU. See *infra*, *Broadcasting Right* chapter, §5, and in this regard Evens, T, Smith, P, & Iosifidis, P (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan.

<sup>402</sup> COM/99/0644, Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - The Helsinki Report on Sport.

<sup>403</sup> See the Helsinki Report, para. 2.

Sport should be able to assimilate this new commercial framework, without losing its identity and autonomy.<sup>404</sup>

The Report, while recognising that the Treaty did not contain any specific provision on sport, stated that the Community had to ensure that the initiatives taken by sporting organisations and State authorities comply with Community law.<sup>405</sup> In this regard, particular attention should be given to competition law and the rules of the internal market: the Commission pointed out that sport, in terms of the economic activity that it generates, is subject to the rules of the Treaty, but account should be taken of the characteristics of the sector, and the interdependence between sporting and economic activity.<sup>406</sup> Without clearly discussing either the nature of these characteristics, nor the extent to which they should be taken into account, the Commission tried to clarify the approach in this area, by distinguishing the possible conduct into three main categories.<sup>407</sup> The first one comprises the set of rules that are inherent to sport, ‘rules of the game’ that are necessary to the existence of the system. The Commission argued that their aim is not to distort competition, and accordingly they could escape the application of the law. On the other side of the spectrum, the conduct that are likely to distort the competition were mentioned. Ranging from entry tickets discriminating between users, to sponsoring agreements foreclosing a market, to the transfer system based on arbitrarily calculated costs, these practices were held to be, in principle, prohibited by competition law. Finally, the last category included those conduct carried out in the context of economic activities generated by sport that have legitimate objectives, and are proportionate to the restriction caused. These conduct are likely to be exempted under Article 101(3) TFEU.<sup>408</sup>

The Commission then stressed the importance of the relationship between professional and amateur sport, especially in respect to the need of solidarity of the system and the

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<sup>404</sup> See Siekmann, R. C. R. (2011) *The Specificity of Sport: Sporting Exceptions in EU Law* International Sports Law Journal. (3) pp. 75-84.

<sup>405</sup> See the Helsinki Report, para. 4.

<sup>406</sup> See the Helsinki Report, para. 4.1.

<sup>407</sup> However, the subdivision in categories does not prejudice the conclusion that the Commission may draw from the case-by-case analysis.

<sup>408</sup> In this sense, the Commission refers to the selling of broadcasting rights, specifically mentioning also the requirement of the benefit of consumers. See para. 4.2.1.

role that national and international organisations should take in this context. It also emphasised how the basic freedoms protected by EU law are generally not impaired by the practices of sports organisations, in so far as the latter are objectively justified, non-discriminatory, necessary and proportionate.<sup>409</sup>

The Helsinki report was followed by a Council Declaration, adopted in 2000 in Nice.<sup>410</sup>

This Document represents another soft law measure, signifying the lack of interest or will to commit to a more binding instrument as a Treaty Article would have been.<sup>411</sup>

The Nice Declaration focused again on the specific characteristics of sport and its social and cultural function in Europe. While it recognised that the Community did not have any direct power in the area of sport, the Council stressed that the Community should take account of the social, educational and cultural value of sport in its action under other Treaty provisions.<sup>412</sup> Institutions were therefore invited to take into account the specific characteristics of sport in a dialogue with sport governing bodies, whose autonomy is fully recognised, when designing and applying their policies.<sup>413</sup> These include aspects related to the promotion of sport, the protection of the fairness of competitions and especially the principle of solidarity throughout the system.<sup>414</sup>

As it was mentioned before in relation to the Amsterdam Declaration, the Nice Declaration represents an attempt to strike a balance between the commercialised nature of sport, and its importance to society as a whole. As soft law measures, rather than imposing a new regulatory framework, the two documents aimed at sketching out general objectives, which was the best result that the sport system was able to achieve

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<sup>409</sup> See Siekmann, R. C. R. (2011) *The Specificity of Sport: Sporting Exceptions in EU Law*, International Sports Law Journal. (3) pp. 75-84.

<sup>410</sup> Council Declaration on the Specific Characteristics of Sport and its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies, Presidency Conclusions, Nice European Council Meeting, 7, 8, 9 December 2000.

<sup>411</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>412</sup> See the Nice Declaration, para. 1.

<sup>413</sup> See Parrish, R. (2003), *The politics of sports regulation in the European Union*, Journal of European Public Policy, 10:2, 246-262.

<sup>414</sup> See Smokvina, V., in Siekmann, R.C.R. (2013), *'Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states'*, Shaker Verlag, Aachen.

from the political process.<sup>415</sup> However, as opposed to the former one, which merely consisted of a paragraph, the three-page Document signed in 2000 can be interpreted as a more serious commitment undertaken by Member States to set a more formalised EU sports policy.<sup>416</sup>

These two Declarations confirmed the rejection of any possible claim for immunity advanced by sporting bodies.<sup>417</sup> Despite the recognition of specific features that characterise sport, these measures did not call for a special treatment for sport under EU law. They rather maintained that, as other industries, the characteristics of the sporting sector should be duly taken into account when applying ordinary provisions.<sup>418</sup> As mentioned before, it is important to notice the role taken by each institution in the process of setting out an EU sports policy. Indeed, the Council has stressed on many occasions the specific nature of sport, asking for greater consideration to be given to the structure of the system and its autonomy.<sup>419</sup> Almost opposed to this is the position of the Commission, which, as Guardian of the Treaty, has been urged to adopt a comprehensive approach for the application of competition law to sport.<sup>420</sup> However, the role of the Commission clashes with the pressure that the Council may exert.

## 6.1 The White Paper on Sport

After years of political discussions, the Amsterdam and Nice Declarations finally granted EU sports policy a first solid background. The Commission then adopted the

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<sup>415</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>416</sup> See Parrish, R. (2003), *The politics of sports regulation in the European Union*, Journal of European Public Policy, 10:2, 246-262.

<sup>417</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>418</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>419</sup> This may be the consequence of a very effective lobbying strategy adopted by Sports Governing Bodies over Member States. See Geeraert, A. and Driessens, E. (2015) *The EU controls FIFA and UEFA: a principal-agent perspective*, Journal of European Public Policy, 22, 10.

<sup>420</sup> See European Parliament, Resolution of 29 March 2007 on the future of professional football in Europe (2006/2130 (INI)), para 11.

White Paper on Sport.<sup>421</sup> Hence, the White Paper<sup>422</sup> cannot be considered as the birth of an EU sports policy, but it rather has to be seen as a measure consolidating a number of policy interventions on themes related to sport.<sup>423</sup> The aim of the White Paper was not to constitute a legal basis for action, or to reduce the scope of application of EU law in the sector, but to clarify the policy position of the Commission, as it was developed throughout the years, and in the light of the case law of the Court of Justice.<sup>424</sup> With the White Paper, the Commission for the first time addressed sports related issues in a comprehensive manner. The document is accompanied by and should be read in conjunction with a Staff Working Document,<sup>425</sup> containing annexes dealing with different aspects, such as the application of EU competition law on sport and the relationship between sport and internal market freedoms.

Resuming from where the Amsterdam and Nice Declarations have left, the White Paper stresses that the sport system is subject to the application of EU law, but it also highlights the societal importance of sport for the citizens of the EU. In particular, the document poses emphasis on the role of sport as a contributing tool to achieve the objective of job creation and economic growth within the European Union.<sup>426</sup> It is then possible to infer that the institution has recognised that the impact sport has on the society cannot be limited anymore to the educational and wellbeing sphere, but it may also extend to pursue economic objectives of public interest.

However, despite the social and cultural importance that it is likely to fulfil, it is clear that there are a range of activities in sport that are mainly of an economic nature, such

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<sup>421</sup> European Commission - White Paper on Sport {SEC(2007) 932} {SEC(2007) 934} {SEC(2007) 935} {SEC(2007) 936}, COM/2007/0391 final.

<sup>422</sup> A White Paper is usually a document containing proposals for action in a certain area. In some cases, it follows a Green Papers, published to launch a consultation process at European level. See [http://eur-lex.europa.eu/summary/glossary/white\\_paper.html](http://eur-lex.europa.eu/summary/glossary/white_paper.html).

<sup>423</sup> Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

<sup>424</sup> See Siekmann, R. C. R. (2011) *The Specificity of Sport: Sporting Exceptions in EU Law*, International Sports Law Journal. (3) pp. 75-84.

<sup>425</sup> Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}.

<sup>426</sup> See White Paper, p.10. These objectives are consistent with the subsequent 'Lisbon Strategy'. See COM (2005) 024 Final of 2 February 2005: Communication to the Spring European Council - Working together for growth and jobs - A new start for the Lisbon Strategy.

as the sale of tickets and media rights, or advertising activities and transfer of players.<sup>427</sup> Moreover, the Commission stresses how the commercialisation of sport has attracted new stakeholders and may pose questions related to governance democracy and representation of interests.<sup>428</sup>

Within the White Paper, the Commission makes a distinction between three domains: the societal and cultural role of sport, the economic importance of sport, and its organisation. The White Paper then recognises the specific characteristics of sport, in particular in relation to two dimensions: these are related to the specificity of the rules that regulate sporting activity, and the specificity of the sport structure and its autonomy.<sup>429</sup> While the first category of rules includes the rules of the game, and the measures aimed at guaranteeing the fairness of competition, the second group comprises the organisation of sport on a national basis, solidarity mechanisms and the principle of a single federation per sport. In this sense, the Commission states that most of the areas can be efficiently regulated by the governing bodies through self-regulation, provided that EU law is respected.<sup>430</sup>

It is important to stress again the significance of these first few statements. The Commission recognises the need to allow the stakeholders of the industry greater representation at governance level. Furthermore, it approves a self-regulatory approach, as long as EU law is upheld. The Commission finally stresses the importance of Social Dialogue and other instruments to enhance the dialogue and the participation of stakeholders within the rule setting and decision-making procedure.<sup>431</sup> In relation to this, the Commission has also proposed to strengthen the cooperation with Member States. Indeed, full support of Member States is necessary to give effect to the switch from a vertical form of regulation and governance, to a horizontal system that grants greater representation to relevant stakeholders.

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<sup>427</sup> See Staff Working Document attached to the White Paper, Annex I ‘Sport and EU Competition Law’, para.1.

<sup>428</sup> See *idem*, para. 4.

<sup>429</sup> See White Paper on Sport, para. 4.1, and Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

<sup>430</sup> See White Paper on Sport, para. 4.

<sup>431</sup> See White Paper on Sport, para. 5.

The Staff Working Document dwells more extensively on the specificity of sport, providing also a list of the features that the Commission considers as characterising sport, such as its competitive nature, the required uncertainty of the outcome, and its monopolistic organisational structure.<sup>432</sup> These characteristics, however, are both significantly relevant in connection with the nature of sport as a leisure activity, and in light of the economic and commercial objectives that the sport system pursues as a business activity.<sup>433</sup>

While the Commission recognises that certain values and specific characteristics of sport have to be taken into account and protected, it also confirms that this cannot justify an exemption from EU law. However, rules designed to protect those features may be considered legitimate, even when they impose restrictions on individuals and undertakings. Indeed, rules related to the organisation of sport may escape the strict application of competition law, when their anti-competitive effects are proportionate and inherent to the pursuit of those legitimate objectives.<sup>434</sup> When affirming this principle, the Commission refers to the case law of the Court of Justice, and it stresses the need for a case-by-case analysis that will take account of all these aspects when assessing a specific rule, thereby excluding also the possibility of issuing any guidelines on the application of competition law in the sport sector.<sup>435</sup>

After the White Paper on Sport, the European institutions have enacted other soft law measures. In 2011 the Commission adopted a Communication on the European

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<sup>432</sup> See Staff Working Document attached to the White Paper on Sport, para. 3.4.

<sup>433</sup> See Budzinski, O. (2012) *'The institutional framework for doing sports business: principles of EU competition policy in sports markets'*, International Journal of Sport Management & Marketing. 11 (1) pp. 44-72.

<sup>434</sup> See the White Paper on Sport, para. 4.1. The White Paper also lists a series of examples of this type of rules, such as the rules of the game, the selection criteria for sport competitions, but also rules regulating multi-ownership of clubs and relocation of teams.

<sup>435</sup> The Commission in particular mentions the *Meca Medina* ruling, see *infra*, in which the Court rejected the notion of purely sporting rule as inapplicable under a competition law perspective. See White Paper on Sport, para. 4.1. In the Staff Working Document, the Commission discusses also about the methodology, taken from *Meca Medina* that has to be applied when analysing a conduct of a sporting entity under the lens of competition law. See the Staff Working Document attached to the White Paper on Sport, at para. 3.4. b).



Dimension in Sport.<sup>436</sup> The Document recognises the importance of the White Paper on Sport, maintaining it as a sufficient basis to deal with aspects not addressed therein. The Communication discusses, again, about the social importance of sport and its economic dimension, and it recognises how the exploitation of media rights is one of the main sources of revenue for sports governing bodies and clubs. However, it also warns that this exploitation must respect the laws of the internal market of the European Union, as well as the right of the public to receive information.<sup>437</sup> Finally, it has to be noted how the Commission reiterates the *Meca-Medina* approach,<sup>438</sup> which aims to assess the proportionality of a restrictive measure in light of the legitimate objectives pursued. Moreover, the Communication lists some objectives that may be considered legitimate in this perspective, such as the fairness of competitions, the protection of athletes' health, the uncertainty of results and even the financial stability of clubs.<sup>439</sup>

Through the series of soft law measures discussed above, the Commission has indicated that its main policy tool in the area of sport is dialogue. The response to the request from Sports Governing Bodies to provide protection to sport through stricter provisions could have not been met in this way. This reflects the lack of competence, or the limited competence granted to the Union in the area of sport.

Although the Parliament has generally supported the approach taken by the Commission,<sup>440</sup> it has also maintained that the case-by-case approach may be detrimental for the system. In its Resolution on the White Paper on Sport,<sup>441</sup> the Parliament has indeed invited the Commission to have due regard of the specificities of

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<sup>436</sup> Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Developing the European Dimension in Sport {SEC(2011) 66 final} {SEC(2011) 67 final} {SEC(2011) 68 final}.

<sup>437</sup> See the Communication Developing the European Dimension in Sport, para. 3.2.

<sup>438</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 42.

<sup>439</sup> See *idem*, para. 4.2.

<sup>440</sup> Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37.

<sup>441</sup> European Union: European Parliament, European Parliament Resolution on the White Paper on Sport, 8 May 2008, P6\_TA(2008)0198.

sport by moving away from a case-by-case approach, and creating more legal certainty through guidelines on the application of EU law to sport.<sup>442</sup> This position is in sharp contrast with the view expressed in the White Paper on Sport<sup>443</sup> and what was held in the study on The Lisbon Treaty and the European Union Sports Policy,<sup>444</sup> whereby it was maintained that there was no need to move away from the established approach.

The Parliament has listed a number of characteristics and needs of the sport system, such as the implementation of a financial licensing system for clubs, that may be legitimately pursued. However, these rules have still to comply with the rules of the internal market, and may have to be the outcome of negotiations with all the interested stakeholders.<sup>445</sup>

## **6.2 The Lisbon Treaty**

The combined effect of the Amsterdam and Nice Declarations, along with the White Paper on Sport and the other soft law measures mentioned before, reflects the increased importance that has been attributed to sport throughout the years. This set of measures can be seen as the necessary preliminary step before the adoption of Article 6 and 165 TFEU with the Lisbon Treaty. The soft law measures have effectively been replaced by the Treaty provisions. Indeed, they mention the specific nature of sport, that the EU institutions have to take into account when contributing to the development of the European dimension of sport.<sup>446</sup>

The impact of the reform enacted through the Lisbon Treaty will be assessed later on in the thesis, but it is worth mentioning it and briefly discussing it in this section as well.

Until the entry into force of the Lisbon Treaty in 2009, the institutions of the European Union did not have any power specifically provided in relation to sport.<sup>447</sup> Indeed,

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<sup>442</sup> See the Resolution on the White Paper on Sport, para. 4.

<sup>443</sup> See White Paper on Sport, para. 4.1.

<sup>444</sup> European Union: European Parliament, Directorate-General for Internal Policies, Study on the Lisbon Treaty and EU Sports Policy, 28 September 2010, IP/B/CULT/IC/2010-028, p.12.

<sup>445</sup> See the Resolution on the White Paper on Sport, points 17 – 19.

<sup>446</sup> See Siekmann, R. C. R. (2011), *The Specificity of Sport: Sporting Exceptions in EU Law*, International Sports Law Journal. (3) pp. 75-84.

<sup>447</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

notwithstanding the policy and soft law measures enacted in the past, there was no legal basis in the Treaty to act in the field of sport. Article 6 TFEU introduces sport for the first time as one of the competencies of the Union, alongside education, vocational training and youth. However, the provision points out that the Union has competence in this field only to support, coordinate or supplement the actions of Member States. Sport is therefore included within the policy fields where the Union has a subsidiary competence, the weakest amongst the possible ones, and where the sovereignty rests on the Member States.<sup>448</sup> In this regard, the EU institutions can only contribute to the promotion of sporting issues, with no possible harmonisation within the sector. The first and immediate consequence of the inclusion of sport within the Treaty provisions, therefore, is only the creation of an EU budget stream solely devoted to sports projects.<sup>449</sup>

Article 165 TFEU, introduced with the Lisbon Treaty as well, includes the concept of specificity of sport in a legislative measure. The provision does not constitute a horizontal clause, which would oblige the institutions to take the sports' specificities into account when applying any other EU provisions or exercising powers in other areas.<sup>450</sup> However, it is binding, meaning that the institutions will still consider it to some extent when applying competition law or free movement provisions to sport.

The Article mandates the Union to contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, and its structures based on voluntary activity and its social and educational function. In the second paragraph it then specifies that the action of the Union should aim at developing the European dimension of sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and

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<sup>448</sup> See European Commission, KEA – CDES: Study on the Economic and Legal Aspects of Transfers of Players, 7 February 2013.

<sup>449</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011

<sup>450</sup> See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p. 49. On the other hand, however there is no provision expressly prohibiting the EU to take those aspects in consideration. See Parrish, R., in Siekmann, R.C.R. (2013), *Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states*, Shaker Verlag, Aachen.

moral integrity of sportsmen and sportswomen. A topic of discussion in this regard may be related to the interpretation of the notion of fairness and openness. These terms may be referred to values that must be respected for the benefit of participants and fans, such as the right to access to the competition, or they may be used by sporting bodies to justify restrictions in place to protect some characteristics inherent to the sport system.<sup>451</sup> Article 165 TFEU finally clarifies that the Union may pursue these objectives only through incentive measures, with the express exclusion of any harmonisation of laws and regulations. Albeit prohibiting harmonising measures, the Article may still have an important effect on the system and on the institutions applying EU law to sports related matters.<sup>452</sup>

The analysis of the provisions will be carried out in a subsequent section of the thesis, where the impact of Article 165 TFEU will be further assessed. However, some conclusions may be already drawn here. It is clear, for instance, that the official recognition of the specific features of sport cannot remain only on paper: the societal role of sport and its importance are now fully accepted and may not be overlooked anymore. Moreover, sporting bodies may refer to the protection of the specificities, instead of their private economic interests, to justify restrictive conduct.<sup>453</sup>

The provisions, moreover, include the concept of specificity of sport within the Treaty. However, the Article does not provide a definition of this concept. The authors of the Study on the Lisbon Treaty and EU sports policy have therefore suggested that the sports movement should take a leading role in defining the concept, in order to better substantiate its claim for autonomy. This definition should be included into the relevant

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<sup>451</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>452</sup> Although only with the aim of reaffirming the existing case law, Article 165 TFEU has already been cited in two cases, such as *Murphy* and *Bernard*. See Joined Cases C-403/08 and C-429/08, *Murphy*, [2011], ECR I-09083, para. 101, and Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010], ECR I-02177, para. 40. See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>453</sup> See in this regard the distinction made by Advocate General Kokott in *Murphy*, in relation to commercial interests and sporting interests. Case QC Leisure (C-403/08) /*Murphy* (C-429/08) [2011] ECR I-09083, Opinion of AG Kokott, para. 210.

sports regulations, be the product of the discussion between governing bodies and affected stakeholders, and be supported with thorough reasoning and robust data.<sup>454</sup>

Other soft law measures have been enacted after the adoption of the Lisbon Treaty. In this regard, the European Parliament has adopted a Resolution,<sup>455</sup> urging the Commission to look more systematically into restrictive and abusive practices put in place by international sport federations. This measure takes the cue from an investigation opened by the Commission on the practice of the International Skating Federation of prohibiting its members from taking part in events not sanctioned by the Federation itself, with the threat of a life ban on athletes, officials and coaches.<sup>456</sup>

Similar to this, in 2014 the Commission has issued a Decision<sup>457</sup> formalising an agreement with UEFA under article 17 TEU.<sup>458</sup> In this instance, the Commission has formally expressed its intention to cooperate with UEFA on matters of shared interest. The document presents a series of considerations on important issues in sport, and on the way to address concerns in light of the specific characteristics of the system. The text of the arrangement stresses the cultural and societal importance of sport, but also its ability to contribute to the economic growth of the Union.

The arrangement does not establish concrete commitments of the parties, but clarifies the position of the Commission in respect of some important issues. However, as a

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<sup>454</sup> European Union: European Parliament, Directorate-General for Internal Policies, Study on the Lisbon Treaty and EU Sports Policy, 28 September 2010, IP/B/CULT/IC/2010-028, pp. 11-12.

<sup>455</sup> European Union: European Parliament, European Parliament Resolution on the Annual Report on EU Competition Policy, 11 March 2015, P8\_TA(2015)0051, para. 94.

<sup>456</sup> See European Commission, Press Release IP/15/5771, Antitrust: Commission opens formal investigation into International Skating Union's eligibility rules, Brussels, 5 October 2015. The Commission has sent a Statement of Objections to the International Skating Union (ISU), holding that the penalties set by ISU restrict the commercial freedom of athletes and prevent the entry into the market of new events' organisers, which are unable to attract top athletes. See European Commission, Press Release IP/16/3201, Antitrust: Commission sends Statement of Objections to International Skating Union on its eligibility rules, Brussels, 27 September 2016.

<sup>457</sup> See European Commission: C(2014) 7378 final, Commission Decision of 14.10.2014 adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA).

<sup>458</sup> The Commission could not rely on Article 165 TFEU to adopt the Decision, as that provision does not grant it such a power. It therefore had to rely on Article 17 TEU, which regulates the activity of the European Commission, establishing that it shall promote the interest of the Union and take appropriate initiatives to that end.

Decision, this measure is binding in its entirety and may create rights<sup>459</sup> and especially give rise to legitimate expectations of third parties.<sup>460</sup> This aspect is particularly relevant in relation to the themes of financial solidarity and long-term viability of competitions. In this regard, the Arrangement provides support for measures imposing redistribution mechanisms of audio-visual media services and training compensation fees.<sup>461</sup> Furthermore, it considers positively the Financial Fair Play rules, as measures contributing to the sustainable development and healthy growth of sport in Europe.<sup>462</sup> Finally, the Arrangement recognises the Arbitration tool as the most appropriate system of dispute resolution in sport.<sup>463</sup>

Although the legal value of this Decision may be unclear, it has a political significance that cannot be ignored.<sup>464</sup> Indeed, it maintains that some of the objectives of the system can and should be legally pursued through self-regulation, provided that they comply with EU competition law. This is a confirmation of the role of the institutions, whereby a mere autonomy of Sports Governing Bodies cannot be granted, and the shift towards a co-regulatory approach has become necessary.<sup>465</sup>

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<sup>459</sup> See Article 288 TFEU. However, the Decision itself, at para. 5.4 stipulates that it does not create rights or obligations under International, European and domestic law. See Duval, A., (2014) *The new 'Arrangement' between the European Commission and UEFA: A political capitulation of the EU*, Asser International Sports Law Blog, 15 November 2014, available at <http://www.asser.nl/SportsLaw/Blog/post/the-new-arrangement-between-the-european-commission-anduefa-a-political-capitulation-of-the-eu> [last accessed 7 February 2016].

<sup>460</sup> See Chalmers, D., Davies, G. & Monti, G. (2014), *European Union law*, Cambridge University Press, Cambridge, United Kingdom, p. 412.

<sup>461</sup> See the Decision, at para. 2.6.

<sup>462</sup> This follows a Joint Statement of the Vice President of the Commission and the President of UEFA, where the institution had already recognised the legitimacy of the objectives pursued through the FFP. See Joint Statement by Joaquín Almunia, Vice President, European Commission, and Michael Platini, President, UEFA (Mar. 21, 2012), available at [http://ec.europa.eu/competition/sectors/sports/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf).

<sup>463</sup> The Decision states however that all these measures must comply with EU law, and especially competition law.

<sup>464</sup> See Bastianon, S. (2015), *The Striani Challenge to UEFA Financial Fair-Play. A new era after Bosman or Just a Washout?*, *The Competition Law Review*, 1, 1, pp. 7 – 39.

<sup>465</sup> See Geeraert, A. (2015), *The European sectoral social dialogue committee in professional football: power relations, legitimacy and control*, *Soccer & Society*, 16, 1.

Having discussed the basics of EU sports policy, it is appropriate to provide an overview of the development of EU sports law as well. This will also better clarify the categorisation of sporting rules that has been previously proposed. As mentioned before, sporting bodies have always tried to put forward a claim for their autonomy, somewhat supported by the lack of interest shown by national legal systems toward the regulation of the sector.<sup>466</sup>

The first chance for examining the legality of sporting rules under EU law presented itself in *Walrave*.<sup>467</sup> In this case, two Dutch professional pacemakers argued that the rule of the *Union Cycliste Internationale* requiring pacemakers to be of the same nationality of the cyclist in medium distance races<sup>468</sup> was restricting the freedom of movement of workers and services.<sup>469</sup> The Court had to establish whether EU law could be applied to sport, in lack of an express competence, and whether acts of private bodies were subject to Treaty provisions on the freedom of movement of workers and freedom to provide services.

In relation to the first point, the Court held that sport was subject to EU law insofar as it constituted an economic activity,<sup>470</sup> within the meaning of Article 3 TEU.<sup>471</sup> In particular, when such an activity had the character of gainful employment or remunerated service, the law will be applied to it in the orthodox manner. However, this meant that sporting bodies were able to advance the claim that sport was not an economic activity, and that rules of purely sporting nature fell off the scope of application of EU law.<sup>472</sup>

The Court subsequently addressed the question related to acts adopted by private bodies, and their relationship with EU law. In practical terms, the issue in this regard

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<sup>466</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands and Geeraert, A. (2015), *The European sectoral social dialogue committee in professional football: power relations, legitimacy and control*, Soccer & Society, 16, 1.

<sup>467</sup> See Case 36/74, *Walrave & Koch v. Association Union cycliste internationale* [1974] ECR 1405.

<sup>468</sup> The cyclist (stayer) follows the motor-powered pacemaker, in order to achieve a higher speed than an unaided cyclist.

<sup>469</sup> Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague. p. 47.

<sup>470</sup> See *Walrave* para. 4.

<sup>471</sup> At the time of the judgment, Article 2 of the EEC Treaty.

<sup>472</sup> See *Walrave*, para. 8.

was whether Treaty article carried horizontal direct effect,<sup>473</sup> thereby capable of being invoked by a private party as an athlete, against another private party as a Federation. The Court held that the rules on free movement were applicable to the conduct of any entity aiming at collectively regulating gainful employment and services.<sup>474</sup> This definition would exclude individual sport clubs, but it would cover governing bodies that, as private regulators, are able to control the activities of individual employees.<sup>475</sup> The Court finally had to deal with the jurisdictional question, whether Treaty articles could affect and invalidate provisions of international associations covering countries that were sitting outside the jurisdictional reach of EU law. In this regard, the Court held that the rule on non-discrimination applies to all legal relationships that can be located within the territory of the Union, by reason of the place where they were entered into, or where they took effect.<sup>476</sup>

The Court concluded its analysis by holding that this type of rule, and the discrimination that it carried along, had to be considered as falling out of the scope of the Treaty. In this regard, the existence of an economic element was not in discussion: it was not important whether the rule had an economic effect, but whether the discrimination was justified by economic reasons.<sup>477</sup>

The Court confirmed its approach in *Donà v Mantero*,<sup>478</sup> where it stated that the notion of economic activity had to be intended as including the conduct of professional and semi-professional sport players.<sup>479</sup> The Court held that rules adopted by a sporting organisation limiting the right of professional or semi-professional football players to

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<sup>473</sup> Craig, P. P. & De Búrca, G. (2015) *EU law: text, cases, and materials* / Paul Craig and Gráinne de Búrca. Oxford: Oxford University Press; 6th Ed, pp. 184 *et seq.*

<sup>474</sup> See *Walrave*, para. 17.

<sup>475</sup> Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague. p. 53. Parrish noted that the CJEU jurisprudence has evolved in areas not concerning sport, expanding the horizontal effect of Treaty articles to comprise also the activity of individual employers and private persons. See Case 43/75, *Defrenne*, [1976] ECR 455, para. 39, and Case 281/98, *Roman Angonese* [2000] ECR I-4139, para. 36.

<sup>476</sup> See *Walrave* para. 28.

<sup>477</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

<sup>478</sup> Case 13/76 *Donà v Mantero* [1976], ECR 1333.

<sup>479</sup> *Idem*, para.12.



take part in matches solely on nationality grounds were incompatible with EU law.<sup>480</sup> Such rules could not be considered of sporting interest only, but they would still be exempted if justified by reasons that were not economic in nature.<sup>481</sup>

The matter was discussed again only in *Bosman*,<sup>482</sup> almost twenty years later. In this instance, the International Football Federation claimed that the economic activity of sport clubs had to be considered negligible, and was therefore falling outside the scope of EU law, whilst only major sport leagues could be regarded as undertakings. The Court dismissed this reasoning,<sup>483</sup> and held that the player registration system adopted by the International Football Federation,<sup>484</sup> permitting clubs to retain players' registrations even after the expiration of the contract, was restricting the freedom of movement of workers.<sup>485</sup>

As opposed to a mere deference to the 'sporting nature' of rules, the Court recognised the difficulty of severing the economic aspects from the sporting ones:<sup>486</sup> the vast majority of sporting rules exert economic effects, and hence the economic activity that sport generates irremediably falls under the scope of application of EU law.<sup>487</sup> Therefore, the rule was considered to constitute an obstacle to the freedom of movement of players, that, as such, had to be assessed in the search of a justification. In this regard, the Court took into account non-economic reasons concerning sport as such, thereby including them into the assessment of the restriction. The rule was considered to pursue legitimate objectives, such as maintaining the financial and

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<sup>480</sup> See *Donà v Mantero*, para.19, and Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague, p. 51.

<sup>481</sup> See *Donà v Mantero*, para. 18 and Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37.

<sup>482</sup> See Case C-415/93, *Union des Associations Européennes de Football (UEFA) and others v Jean-Marc Bosman*, [1995] ECR I-04921

<sup>483</sup> See *Bosman*, paras. 70 – 72.

<sup>484</sup> FIFA hereinafter.

<sup>485</sup> One of the questions asked to the Court was also related to the compatibility of such a rule with EU competition law. However, having held that the rule was infringing freedom of movement provisions, the Court stated that it was not necessary to assess its compliance with competition law as well. See *Bosman*, para. 138.

<sup>486</sup> See *Bosman*, para. 76.

<sup>487</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

competitive balance between clubs, and support training efforts of the clubs.<sup>488</sup> However, the Court held that the restriction the rule caused was disproportionate to these objectives, going beyond what was necessary to achieve them.<sup>489</sup>

The scenario was drastically changed from *Walrave* and *Donà*, and sport was definitely falling under the scope of EU law. The Court confirmed and perfected this approach in *Deliege*.<sup>490</sup> In yet another case involving discrimination based on national grounds, it was held that selection rules for competing at international championships have to be considered inherent and necessary to the organisation of sport, notwithstanding their ability to restrict the number of participants in the competition.<sup>491</sup> Participating in competitions at international level had to be regarded as a form of provision of services, regardless of the economic value attached to the performance of the individual athletes, their professional or non-professional status and even their direct remuneration.<sup>492</sup> Restrictions to these rights were consented only if proportionate to legitimate objectives, regardless of a detrimental effect that athletes may suffer.<sup>493</sup> The Court recognised an area of autonomy of governing bodies, as their expertise makes them the best placed entities to regulate their own sectors.<sup>494</sup>

This inherent approach was furthermore adopted in cases assessing the legality of sporting rules under competition law. In *Meca-Medina*, an integrity rule sanctioning the use of doping was considered as inherent to the organisation of sport, thereby not falling under article 101(1) TFEU.<sup>495</sup> The Court considered in this instance the existence of a legitimate aim, as the protection of health and of the fairness of the competition, and whether the rule was necessary and proportionate to achieve that

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<sup>488</sup> *Bosman*, para. 106.

<sup>489</sup> See *Bosman*, paras 127 – 128 and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>490</sup> Case C-51/96, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo*, [2000], ECR I-02549.

<sup>491</sup> See *Deliege*, para. 64.

<sup>492</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

<sup>493</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>494</sup> See *Deliege*, para. 68.

<sup>495</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 42.

objective.<sup>496</sup> The Commission applied the inherency test again in *ENIC*,<sup>497</sup> whereby rules prohibiting multiple ownership of clubs were deemed proportionate to pursue a legitimate aim, and therefore not to infringe Article 101(1) TFEU.

The Court departed from this approach in *Lehtonen*:<sup>498</sup> in this instance, the Court of Justice held that the setting of a transfer deadline for players, albeit restricting the freedom of movement of workers and their chances of employment,<sup>499</sup> could meet the objective of ensuring the regularity of competition.<sup>500</sup> The Court therefore relied on non-economic grounds and referred to considerations related to sport as such, and hence to the characteristics and specific needs of the system to justify the rule. However, the restriction was still considered to be disproportionate in relation to the objectives pursued.<sup>501</sup>

Similarly, the Court in *Bernard*<sup>502</sup> relied on objective justifications in order to assess the conduct of sporting bodies, and more specifically the legality of the rule imposing training compensation for young players, and the proportionality of such a measure in relation to its objectives. This case is also relevant as in this instance the Court cited for the first time Article 165 TFEU, stating that within the analysis of sporting rules the specific characteristics of sport and of their social and educational function must be taken into account.<sup>503</sup> In a subsequent case, dealing with the exploitation of

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<sup>496</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>497</sup> See Case COMP/37 806: *ENIC/ UEFA*.

<sup>498</sup> See Case C-176/96, *Lehtonen et al v. FRBSB* [2000], ECR I-02681.

<sup>499</sup> See *Lehtonen*, para. 50 and Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

<sup>500</sup> See *Lehtonen*, para. 53 and Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37.

<sup>501</sup> See *Lehtonen*, paras. 56 - 58 and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>502</sup> See Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010], ECR I-02177.

<sup>503</sup> See *Bernard*, para. 39. It must however be noticed that in her Opinion, Advocate General Sharpston held that the characteristics of sport should not be taken into account when assessing whether a restriction is present, but can only be considered when examining possible justifications for such a restriction, just as it would happen in any other sector. See Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010], ECR I-02177, Opinion of AG, para. 30.

broadcasting rights,<sup>504</sup> the Court made reference to article 165 TFEU, again to corroborate the previous case law. The Court in *Murphy*, questioned on the application of article 101 TFEU on licensing agreements, decided to follow an orthodox approach, whereby the connection with sport merely constituted a characteristic of the product to be broadcasted. Indeed, the Court held that the specific characteristics of sport mentioned in article 165 TFEU cannot justify a special status to sport broadcasting rights under EU law.<sup>505</sup>

It is appropriate to conclude this brief overview with the cases that have dealt with the use of regulatory power in sport and its abuse. In *FIA*<sup>506</sup> and *MOTOE*,<sup>507</sup> the Commission, first, and the Court subsequently assessed the legality of the system in place, where Federations were granted both regulatory and commercial rights over the participants to the competition and over their own competitors. *MOTOE* is of particular interest for the inclusion of sports federations which may be, to some extent, vested with public powers under the definition of undertaking. They will still be classified as undertakings for the remainder of their economic activities, and regardless of their possible non-profit status.<sup>508</sup> As undertakings, though, Federations that are endowed with regulatory powers are also in a position of dominance, and they have to be prevented from abusing it under article 102 TFEU.<sup>509</sup> In light of objective justifications, conduct that are proportionate to their goals could be deemed not to fall under Article 102 TFEU. Further, they could be exempted if they would create efficiency outweighing the distortion. However, when the undertakings are pursuing private

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<sup>504</sup> See Cases C-403/08 and C-429/08. *Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083. See *infra* the chapter on Broadcasting Rights for a more detailed discussion of the case.

<sup>505</sup> See Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>506</sup> European Commission, Press Release IP/01/1523. Commission closes its investigation into Formula One and other four-wheel motor sports, 30/10/2001.

<sup>507</sup> See Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio*, [2008], ECR I-04863.

<sup>508</sup> See *MOTOE*, at para. 25.

<sup>509</sup> See Miettinen, S. (2008). *Policing the boundaries between regulation and commercial exploitation: Lessons from the MOTOE case*, International Sports Law Journal, 3(4).

interests, rather than acting solely in the public interest, the proportionality test will be stricter.<sup>510</sup>

The main consequence that can be drawn from this overview is that in the field of freedom of movement, objective sporting reasons can justify restrictions, as long as they are proportionate to achieve the aims. Sport as such cannot be excluded from the scope of EU law, but it is within the context of the application of an orthodox approach, that the Court will consider the reasons and needs of the sporting system. One of the questions that will be discussed later on is whether the same orthodox approach can be seen in the area of competition law, and therefore whether there can be convergence between the two areas.

As it can be understood from the overview provided, all the cases examined by the Court in this context were dealing with possible restriction of freedom of movement. Breaches of competition law have been assessed only later on by the institutions,<sup>511</sup> and will be discussed hereinafter.

## **8. Conclusion**

This chapter has tried to answer one of the fundamental questions underlying this research by discussing the features that uniquely characterise sport. In order to include the analysis into the most appropriate framework, sporting rules were divided into macro-categories and the general features of the European Sport system were presented.

The discussion on the characteristics of sport has been placed immediately after the chapter analysing the rules of EU competition law, with the intent of clarifying the relationship between them. In particular, the sport system has characteristics and a set of rules that are likely to conflict with EU law. Each industry has its own features, and to the extent that sport is considered an economic industry, it does not differ from the others. This section discussed what these characteristics are; the goal, however, was not

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<sup>510</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>511</sup> Albeit discussed in *Bosman*, and by the Advocate General in *Deliege*, and *Lehtonen* para. 107.

to provide a sterile list. The aim was instead to assess their importance, in light of the review of the literature undertaken, but also through the discussion of the soft law measures adopted in this regard by the institutions of the European Union. The specificity of sport has been mentioned in multiple occasions by the European institutions, but with no definitive clarification as to what should this notion encompass, and to what effect.

As opposed to a mere acceptance of the specificity of sport, the chapter has provided an original contribution by discussing which of the characteristics presented can be considered exclusively in relation to sport. In particular, the purpose was to identify the features that are inherent to the system, and without which there can be no sport. Aside from the cultural and social value of sport, which is clearly very relevant in the context of this research, the key feature could be considered the need to have a competition, necessary for the existence of the system itself. Without competition there would be no clubs, athletes and associations; the competition represents the product that fans and media companies will buy. This may justify the need to have an overarching framework and structure in which to include the competition, and the consequent need for a system exercising a great deal of control over it. The institutions, and the Commission in particular, have recognised the specific nature of sport and its ability to rely on self-regulation and autonomy. However, the chapter has highlighted the pressure that industry stakeholders, institutions and Member States have progressively exercised to move towards a form of co-regulation and horizontal system of governance.

On the other hand, however, the characteristics of the sport product, as an ephemeral and transient experience, albeit important, are only the features of the product of this specific industry. When other characteristics are discussed to a greater extent, it is possible to appreciate how they may not be exclusively related to sport,<sup>512</sup> or that they

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<sup>512</sup> The level of attachment of sport fans to their respective teams may be compared with the customers of luxury products; another example is the nature of sport, which ranges from leisure activity to a profit-making enterprise. The same can be said for theatre and arts.

may not be necessary for the existence of the system itself.<sup>513</sup> Furthermore, the fact that the sport system has unique characteristics does not immediately imply that they require a unique application of competition law. Taking them into account does not mean that restrictive conduct put in place by sporting bodies may be exempted under an inherent rule approach<sup>514</sup> or that they should get treated in a way that differs from the orthodoxy.

When conduct, rules and regulations pursue legitimate objectives, they may be exempted from the application of EU law under Article 101(3) TFEU, as long as they are also necessary and proportionate to achieve those objectives. The next sections of the thesis will discuss how the institutions of the European Union have applied the notion of sport specificity and to what extent it has been recognised and protected, by examining the case law of the Court and the decision practice of the Commission.

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<sup>513</sup> The competitive balance could be seen as a preference of the supplier and of fans, rather than a requirement for the system.

<sup>514</sup> See Case C-309/99, *Wouters* [2002], ECR I-01577.

## CHAPTER THREE: Integrity Rules and Regulatory Rules

**1. Introduction; 2. Integrity Rules; 2.1 Meca-Medina; 2.2 ENIC/UEFA; 2.3 Mouscron; 3. Regulatory Rules; 3.1 MOTOE; 3.2 FIA; 3.3 Piau; 4. Integrity and Regulatory objectives, public policy objectives and efficiency; 5. Conclusion**

### **1. Introduction**

This chapter will focus on two of the categories of sporting rules that have been identified in the previous chapter. The categorisation presented above, based the work of Foster<sup>515</sup> and reflected in the White Paper on Sport published by the Commission,<sup>516</sup> will be used here to discuss the application of EU competition law to regulatory rules and the integrity rules. The area of broadcasting rights and their exploitation, as one main example of commercial rules in sport, and the rules related to the labour relationships within the sport system will be analysed in the subsequent chapters.

As from the brief overview presented in the previous chapter, one of the main conclusions that can be drawn is that, at least in the field of freedom of movement, objective sporting reasons can justify a restriction, as long as it is proportionate to achieve legitimate aims. Sport as such cannot be excluded from the scope of EU law, but it is within the context of the application of an orthodox approach that the Court will consider the reasons and needs of the sporting system. One of the questions that will be discussed in this chapter is whether the same orthodox approach can be seen applied in the area of competition law. The objective of this section, and to some extent of the ones that follow, is to provide an analytical overview of the cases dealt with by the European Commission and the Court of Justice in relation to the application of competition law to sport. The chapter will therefore endeavour to draw some conclusions and highlight the approach taken by the EU institutions in relation to the

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<sup>515</sup> See Foster, K, *Is there a global sports law*, in Siekmann, R.C.R. & Soek, J. (2012), *Lex sportiva: what is sports law?*, T.M.C. Asser Press, The Hague, The Netherlands; Berlin, and chapter 2, § 2.

<sup>516</sup> See European Commission, White Paper on Sport, COM(2007) 391 Final, and the Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}.



application of competition law to regulatory rules, such as the regulation of clubs' ownership, and integrity rules, such as anti-doping. Furthermore, the chapter aims at highlighting the relationship that EU institutions have established with Sports Governing Bodies in the sector, in light of the objectives pursued by the latter. It will be submitted that there is a need for a more cooperative relationship between the EU institutions and Governing Bodies. This may be achieved through a greater use of tools already available as the Social Dialogue, or through the issuing of Guidelines to clarify the application of competition law in the area.

The first part of the chapter will therefore focus on the cases dealing with integrity rules: they aim at protecting the fairness of the game, and the ethical principles that underlie sport. The second section deals with the rules that discipline the use of regulatory power in sport, and the governance of the system. In a general perspective, both categories are likely to pursue legitimate objectives. However, they also exert an economic effect on individuals and entities subject to them, whose interests and freedoms may therefore be impaired. They may also pursue private economic interests of the Governing Bodies. In this context, it will be important to assess whether and to what extent the economic interests that may underlie these rules are taken into consideration in assessing their lawfulness under competition law.

## **2. Integrity Rules**

This part of the research will be focused on the first two categories of sporting rules. In particular, the first subchapter will discuss the rules that aim to protect the integrity and fairness of sport. Indeed, the competitive nature of sport requires some form of protection, so that clubs, athletes or any other bodies involved in the game will not be able to deceive their competitors and gain victories in an unfair manner. This need for integrity is of utmost importance in light of the value that sport has in society, especially in relation to its educational and cultural role.<sup>517</sup> If sportspeople have the

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<sup>517</sup> See the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Declarations adopted by the Conference - Declaration on

ability of becoming role models, then their conduct should be ethically sound and, ideally, flawless.

However, there is a significant economic interest underlying this need. Governing bodies need to protect the fans' perception of the integrity of the competition; ultimately they are the final customers of the sports product. A lack of perception of integrity of the competition would likely cause a disaffection of fans, which would then lose interest in the game. It is therefore possible to see a private economic interest that goes alongside with the protection of the original nature of sport and its ethical principles. The objective of the following section is to assess whether and to what extent these economic interests have been considered by the EU institutions when analysing these rules under the lens of competition law. The outcome of this discussion will shine a clearer light on the approach of the institutions towards the notion of specificity of sport.<sup>518</sup>

This part of the chapter will therefore provide an analytical overview of case law and decision practice of the EU institutions in relation to integrity rules in sport. The subdivision in itself has only a limited relevance, as some of the rules may pursue a number of different objectives, and thus they may be included in more than one category.

## 2.1 Meca-Medina

The first case that will be discussed in this instance is *Meca-Medina*.<sup>519</sup> for the first time the European Courts dealt with the application of Article 101 and 102 TFEU to a sporting rule, adopted by a sporting association and related to a sporting activity.<sup>520</sup>

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sport, OJ C 340, 10/11/1997, and European Commission, *White Paper on Sport*, COM(2007) 391 Final, at para 2 *et seq.*

<sup>518</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

<sup>519</sup> Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991.

<sup>520</sup> See the Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, para. 3.4.

One of the most important aspects related to the integrity and the fairness of sport is the fight against doping. The use of performance enhancing substances has been considered a plague for the system, that had to be eliminated or at least severely limited.<sup>521</sup> Rules prohibiting doping have the objective of protecting the fairness of the game, in light of its educational role. However, their application is likely to cause restraints on the freedoms and the activity of athletes. A ban or suspension of an athlete from carrying out the sporting activity is clearly restrictive of his economic activity as well. Hence, the question that has to be considered is the justification given to such a restriction, and its proportionality in relation to its objective.<sup>522</sup>

In 2006 the Court of Justice finally examined a doping case, *Meca-Medina*.<sup>523</sup> The case involved two swimmers, David Meca-Medina and Igor Majcen, who failed an anti-doping test in 1999 in Brazil, and were subsequently suspended by the International Swimming Federation<sup>524</sup> for four years. The two athletes appealed the decision of the FINA Doping Panel before the CAS, which confirmed the suspension. After the coming to light of new scientific evidence, the athletes, with the agreement of FINA, filed a new appeal before the CAS, which reduced the suspension to two years.<sup>525</sup> Significantly, the applicant did not appeal against this decision before the Swiss Federal Tribunal, the ordinary route to challenge a CAS award. Instead, the swimmers filed a complaint with the European Commission, arguing that the anti-doping rules adopted by the International Olympic Committee, to which FINA had to abide, were restrictive under Article 101 TFEU. Moreover, they claimed that the fixation of a low limit of nandrolone, the prohibited substance, had to be construed as a concerted practice between the IOC, FINA and the accredited network of laboratories carrying

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<sup>521</sup> See Communication from the Commission to the Council, the European parliament, the Economic and Social Committee and the Committee of the regions - Community support plan to combat doping in sport COM(1999) 643 final.

<sup>522</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>523</sup> Case C-519/04 P, *Meca-Medina* [2006] ECR I-6991.

<sup>524</sup> Federation Internationale de Natation, FINA hereinafter.

<sup>525</sup> See Case C-519/04 P, *Meca-Medina* [2006] ECR I-6991, paras. 8 – 13.

out the analysis.<sup>526</sup> The athletes contended that the limit was arbitrary and not scientifically based, and capable of excluding innocent or even negligent swimmers from the sporting activity.<sup>527</sup> The complainant finally maintained that the dispute settlement procedure set by the IOC was restrictive and abusive under Article 102 TFEU, calling into question the independency of the CAS.

The Commission rejected the complaint in its entirety,<sup>528</sup> holding that the rules in question were necessary for the organisation of the sporting competition. Furthermore, they were not having as their object the restriction of the competition on the market.<sup>529</sup> Moreover, the Commission argued that the anti-doping rules did not fall under the scope of the IOC and FINA's economic activity, which was instead related to the exploitation of the events.<sup>530</sup> The restrictive effect of the rules was therefore considered acceptable, as inherent to the organisation of the competition and necessary to the pursuit of the objectives of protecting the fairness of the competition, the health of the athletes, and the ethical values of sport.<sup>531</sup> The Commission applied the criteria set out in *Wouters*,<sup>532</sup> holding that a restriction that is inherent to the pursuit of legitimate objectives does not fall under Article 101(1) TFEU, so long as it is proportionate to them. The institution therefore made use of a principle that had been established in a case involving the application of Article 101 to a regulation adopted by the Bar of the Netherlands, prohibiting partnerships between Members of the Bar and members of other professions.

The swimmers then brought an action for annulment of the Commission's Decision before the General Court, maintaining that the institution was wrong in applying *Wouters* and in not considering the IOC as an undertaking under the scope of

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<sup>526</sup> Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

<sup>527</sup> See Case C-519/04 P, *Meca-Medina* [2006] ECR I-6991, para. 16.

<sup>528</sup> Case COMP/38158 - *Meca-Medina and Majcen*/IOC.

<sup>529</sup> Case COMP/38158 - *Meca-Medina and Majcen*/IOC, para. 41.

<sup>530</sup> Case COMP/38158 - *Meca-Medina and Majcen*/IOC, para. 38 and Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

<sup>531</sup> Case COMP/38158 - *Meca-Medina and Majcen*/IOC, Paras. 42 – 45.

<sup>532</sup> See Case C-309/99, *Wouters and others* [2002], ECR I-01577, and *infra*, chapter 2, § 5.

competition law. The General Court, after having reaffirmed the *Walrave* principle,<sup>533</sup> whereby sport falls under EU law in so far as it constitutes an economic activity,<sup>534</sup> recognised as well that sporting activity is capable of taking the form of paid employment or provision of remunerated services.<sup>535</sup> However, in the subsequent paragraphs of its judgment, the Court held that the Treaty applies only to those rules that concern the economic aspects that sporting rules can present.<sup>536</sup> Accordingly, ‘purely sporting rules’ are considered exempted from EU law.<sup>537</sup> the Court therefore reiterated the *Walrave* approach, without taking into consideration the evolution of the jurisprudence of the Court of Justice.<sup>538</sup> The General Court did not assess the proportionality of the restriction caused by the rule, but simply held that its sporting nature was capable of overcoming any other consideration.<sup>539</sup> The Court subsequently held that the sporting rule exception, originally established in relation to freedom of movement of workers, was equally applicable in the area of competition law. Indeed, the fact that sporting rules have nothing to do with economic activity in respect of the freedom of movement means that they do not have anything to do with economic activity in relation to competition law either.<sup>540</sup>

After having depicted this framework, the Court then assessed the nature of the anti-doping rules in question. It argued that anti-doping rules pursue non-economic

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<sup>533</sup> See Case 36/74, *Walrave & Koch v. Association Union cycliste internationale* [1974] ECR 1405, and *infra*, chapter 3, § 7.

<sup>534</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para. 37.

<sup>535</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para. 39.

<sup>536</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para 40.

<sup>537</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para 41.

<sup>538</sup> See for a more detailed analysis of this aspect Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

<sup>539</sup> The existence of purely sporting rules does not find support in the previous case law of the European Courts. The Court of Justice has only affirmed the existence of purely sporting interests, or made reference to the nature of sporting events. See Rincón, A. (2007). *EC competition and internal market law: On the existence of a sporting exemption and its withdrawal*. Journal of Contemporary European Research, 3(3), 224-237.

<sup>540</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para 42.

objectives, and they concern exclusively a non-economic aspect of sport, even when applied to professional sportspersons.<sup>541</sup> However, the Court recognised that there is an inherent economic value in protecting clean sporting contest, and hence that the reason behind the anti-doping rules may be the preservation of IOC and Olympics economic potential. However, it held that the sporting nature of the rules should not be affected by this consideration.<sup>542</sup> The General Court then referred to the Helsinki Report on Sport,<sup>543</sup> according to which rules inherent to the organisation of sport escape the application of competition law. It finally held that the prohibition of doping is based on purely sporting considerations, that have nothing to do with economic consideration.<sup>544</sup> Although the Court highlighted the inapplicability of the *Wouters* test to the case at hand, it nevertheless held that this did not affect its judgment, thereby affirming the decision of the Commission.<sup>545</sup>

The two swimmers appealed the judgment of the General Court before the Court of Justice. They argued that the General Court misinterpreted the case law of the Court of Justice, holding that purely sporting rules have never been excluded from the scope of application of EU competition law. Moreover, the applicants held that the distinction drawn by the General Court between the economic and non-economic aspects of sporting activity was artificial and should have been dismissed.<sup>546</sup> On the contrary, the Commission submitted that the General Court was right in holding that purely sporting rules did not fall within the scope of the free movement provisions. Accordingly, this

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<sup>541</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Paras. 44 – 45.

<sup>542</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para. 56. See Szyszczak, E. (2007). *Competition and sport*. European Law Review. 32, 1, 95-110.

<sup>543</sup> See COM/99/0644, Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework - The Helsinki Report on Sport, and infra, Chap. 3 § 6.

<sup>544</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para. 47.

<sup>545</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para. 65 – 66 and Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

<sup>546</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, paras. 18-19.

had to be construed as a general exception for purely sporting rules, in an attempt to apply a convergence between freedom of movement and competition law.<sup>547</sup>

The Court began by reiterating that sport is subject to European Union law as long as it constitutes an economic activity.<sup>548</sup> It then repeated the formula that subjects sporting activities to the freedom of movement when they take the form of gainful employment or provision of services for remuneration. On the basis of these considerations, the Court held that the mere fact that a rule is sporting in nature does not have the effect of removing the person engaging in the sporting activity from the scope of application of EU law.<sup>549</sup> The Court hence appreciated that a rule or a conduct may be of a sporting nature, and still exert economic effects that have to be analysed under EU law.<sup>550</sup> This amounts to a rejection of the division between economic and sporting aspects of the activity and a final recognition that the two spheres necessarily overlap.<sup>551</sup>

In this regard, it must be noticed that the Court based this conclusion on a number of findings related to freedom of movement and provision of services, stretching this principle to cover also competition law provisions.<sup>552</sup> Moreover, the Court recalled how the provision on freedom of movement may be restricted by conduct and rules justified on non-economic grounds, so long as they are proportionate to achieve their legitimate aim.<sup>553</sup> However, it subsequently clarified that the two sets of provisions have to be considered separately: the fact that a specific rule does not constitute a restriction of freedom of movement does not immediately mean that it does not infringe competition

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<sup>547</sup> This position was in contrast with the finding of the Commission when it first examined the case. See Vermeersch, A. (2007). *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, Journal of Contemporary European Research, Vol. 3, No. 3, pp. 238-254.

<sup>548</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 22, citing the case law of *Walrave, Donà, Bosman, Deliege* and *Lehtonen*.

<sup>549</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 27.

<sup>550</sup> Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague. p. 141.

<sup>551</sup> Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague. p. 146.

<sup>552</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, paras 28-30.

<sup>553</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 23.

law either, or that it satisfies the requirements of Article 101 or 102 TFEU.<sup>554</sup> However, this consideration may be seen merely as a way to draw attention to the weakness of the analysis of the General Court, which did not take into consideration the possible differences between the norms. Hence, the consideration would not be interpreted as a rejection of the convergence thesis.<sup>555</sup> Instead, as the General Court held that, in light of their purely sporting nature, the rules in question were not subject to either freedom of movement or competition law provisions, the Court of Justice decided to set aside the judgment and proceeded to analyse the claim for the annulment of the Commission decision.<sup>556</sup>

The Court pointed out that it is not possible to assess an agreement in abstract and that not every agreement that restricts the freedom of action of the parties necessarily breaches Article 101(1) TFEU. Hence, when assessing a conduct, account must be taken of the overall context in which the conduct itself has taken place, its objective, whether or not the rule and its restrictive effects are inherent in the pursuit of it, and whether they are proportionate.<sup>557</sup> However, the Court failed to carry out a preliminary test, that should have considered whether the IOC and FINA acted as an undertaking in regard to the setting of anti-doping rules.<sup>558</sup>

In regard to the overall context, the EU institution considered that the anti-doping system aimed at safeguarding the health of athletes, but also the ethical and competitive nature of sport. The Court maintained that these rules were proportionate to achieve the said objective.<sup>559</sup> Hence, a conduct that would normally restrict competition and infringe Article 101(1) TFEU, can be justified if it is necessary to achieve a legitimate

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<sup>554</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 32.

<sup>555</sup> See Weatherill S (2008) *Anti-doping revisited—the demise of the rule of ‘purely sporting interest’?* In: Weatherill S (ed) *European Union sports law: collected papers*. T.M.C. Asser Press, The Hague, p.342.

<sup>556</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 34.

<sup>557</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 42, citing para. 96 of *Wouters*.

<sup>558</sup> See Subiotto, R. (2009) *How a lack of analytical rigour has resulted in an overbroad application of EC competition law in the sports sector*, *International Sports Law Review*, 21–2.

<sup>559</sup> See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, paras. 43 – 54.



objective and it is proportionate to it. The approach taken by the Court, however, excludes the possibility of drafting a list of conduct that can be immediately considered as complying with EU competition law, or that, conversely, represent a breach. This represents a total rejection of a possible exemption of purely sporting rules.<sup>560</sup> In any event, it is likely that those rules that were defined as ‘purely sporting’ in the pre-*Meca-Medina* era would still escape the application of competition law.<sup>561</sup>

The appraisal of the inherency and necessity of the rule can only be made in the context and in relation to the objective pursued. The analysis requires a balancing of conflicting values: on one side the rules of the market would impose to strike out restrictive conduct, while on the other non-competition objectives may justify them. The Court has therefore accepted that the analysis under Article 101(1) TFEU may take into account considerations which are not merely related to the efficiency of the market.<sup>562</sup> This assessment, however, is possible only if the specific characteristics and needs of the sport system are taken into account.<sup>563</sup>

At the same time, the ability of the EU institutions to assess the necessity of a rule and the inherency of its effects represents a statement confirming the conditional autonomy of sporting bodies.<sup>564</sup> Sporting bodies, much like other self-regulating collective actors such as the Dutch Bar Council, have been enabled to pursue objectives of general interests.<sup>565</sup> Therefore, although there is no possible blank exemption for their conduct, sporting bodies can use their expertise and enjoy their autonomy insofar as they respect

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<sup>560</sup> See Siekmann, R. C. R. (2011) *The Specificity of Sport: Sporting Exceptions in EU Law*, International Sports Law Journal. (3) pp. 75-84.

<sup>561</sup> See the Commission Staff Working Document to the White Paper on Sport, at p. 39. Here the Commission tried to list a number of rules that, in light of the objectives they pursue, are likely not to breach EU law. See Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37.

<sup>562</sup> See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>563</sup> See Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37.

<sup>564</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>565</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut, and Szyszczyk, E. (2007), *Competition and sport*, European Law Review. 32, 1, 95-110.

the rules of EU law. In particular, sporting bodies will be able to secure sports specific objectives so long as their conduct complies with the principle of proportionality.<sup>566</sup> The approach adopted in *Wouters* and *Meca-Medina* is therefore strikingly similar to the justification of restrictions on freedom of movement, legitimate if they are necessary to satisfy mandatory requirements in the general interest.<sup>567</sup>

To sum up, the Court held that even anti-doping regulations have to be assessed under the lens of competition law, in light of their ability to affect the conditions under which athletes may engage in their activity. However, the objective of ensuring the fairness, integrity and ethical values of sport has been considered legitimate. As long as they are proportionate and necessary to achieve this goal, rules and conduct of this type may be justified, and hence escape the application of Article 101 TFEU. When these rules relate also to private economic interests, the analysis will have to consider the relevance of the latter. In *Meca-Medina* the General Court held that private economic interests of the International Olympic Committee that may be underlying the anti-doping regulation were not sufficient to alter the discussion.<sup>568</sup> Conversely, where rules of associations have been adopted with the mere intent to protect private commercial interests, the analysis will have to consider the pro-efficiency impact of the conduct under Article 101(3) and 102 TFEU.<sup>569</sup>

## 2.2 ENIC/UEFA

The goal of protecting the integrity of sport can also be seen to underlie rules and regulations other than anti-doping. Indeed, the same rationale can be seen in other conduct that aim at preserving the uncertainty of the outcome of sporting events. In 1998, UEFA introduced the ‘Integrity of the UEFA Club Competitions: Independence

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<sup>566</sup> See Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>567</sup> See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>568</sup> See Case T-313/02, *David Meca-Medina and Igor Majcen v Commission of the European Communities* [2004], ECR II-03291, at Para. 56.

<sup>569</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

of Clubs'.<sup>570</sup> According to this regulation, an individual or a company cannot exercise direct or indirect control on more than one club participating in a competition organised by UEFA. If one entity controls or exerts influence on more than one club, only one of them is eligible to be entered into the UEFA Competition. It is then up to the national Association members of UEFA to lay down implementing provisions.

At the time when the regulation was adopted, the English National Investment Company (ENIC) was holding stakes in six football clubs in different European countries.<sup>571</sup> As two of them, respectively AEK Athens and Slavia Prague, qualified for the UEFA Cup in the 1997-1998 season, the rule took effect excluding AEK from taking part in the UEFA Cup in the 1998-1999 season.<sup>572</sup> The two clubs promoted an action before the CAS, appealing against the sanction and the regulation.<sup>573</sup> At the hearing in Lausanne, the Court examined the UEFA rule under a series of provisions, including EU competition law. In relation to this, the CAS found that the objective of the rule was not to restrict competition, but to maintain the integrity of sport, and the fans' perception of the integrity of the competition. This integrity rule, albeit posing restraints on the freedom of clubs' owners, was therefore considered essential to preserve the public confidence in the authenticity of results.<sup>574</sup> Moreover, being responsive to the concerns of spectators was also important in order to render the event attractive for sponsors, media and investors in general.<sup>575</sup> Finally, the CAS rejected the complaint, holding that the rule could not fall under any type of sporting exemption to

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<sup>570</sup> The rule is now written in Article 7bis (5) of the UEFA Statutes, accessible at [http://www.uefa.org/MultimediaFiles/Download/OfficialDocument/uefaorg/WhatUEFAis/02/09/93/25/2099325\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/OfficialDocument/uefaorg/WhatUEFAis/02/09/93/25/2099325_DOWNLOAD.pdf)

<sup>571</sup> At the time, ENIC owned stakes in Glasgow Rangers FC in Scotland (25,1%), FC Basel in Switzerland (50%), Vicenza Calcio in Italy (99,9%), Slavia Prague in the Czech Republic (96,7%), AEK Athens in Greece (47%) and Tottenham Hotspur in England (29.9%). See Decision of the Commission in Case COMP/37 806: ENIC/ UEFA, para. 6.

<sup>572</sup> In deciding which team had to be selected, the clubs' results of the previous five years and the results of the all the other members of the national association were taken into account. See Case CAS 98/200 - AEK Athens and Slavia Prague v UEFA, p.4.

<sup>573</sup> Case CAS 98/200 - AEK Athens and Slavia Prague v UEFA.

<sup>574</sup> Case CAS 98/200 - AEK Athens and Slavia Prague v UEFA, para. 129.

<sup>575</sup> See Case CAS 98/200 - AEK Athens and Slavia Prague v UEFA, para. 27.

competition law, in light of its economic effects and nature, but had to be consented as proportionate to the legitimate objective that it pursued.<sup>576</sup>

Having lost its case before the CAS, ENIC subsequently lodged a complaint against the rule with the European Commission.<sup>577</sup> In relation to the autonomy of the sports system, it is significant to notice that the rule was firstly challenged within the sport system itself and through its judicial bodies. Only after it lost the case in Lausanne, ENIC decided to challenge the system of *lex sportiva*, and its autonomy, by leaving the sport jurisdiction.<sup>578</sup>

In its complaint, ENIC argued that the regulation was capable of distorting the competition and restricting the market for investments in European football. In this regard, the rule affected the ability of clubs of finding investors on one side, and the conduct of investors on the other. Moreover, ancillary markets, such as the market for football players and the market for media rights, could have been affected as well.<sup>579</sup> ENIC held that the regulation infringed Article 101 TFEU, as a decision of an Association of undertaking, and represented an abuse of dominant position under Article 102 TFEU.<sup>580</sup> Although it recognised that the rule could have pursued a legitimate aim, ENIC held that the restriction caused was disproportionate, and that the absolute prohibition for commonly owned teams to take part to the same competition was not the least restrictive means to protect the perception of the public.<sup>581</sup>

On the contrary, UEFA argued that the rule was justified under non-economic grounds as necessary for the organisation of sport. The Association therefore tried to draw a comparison between the case law on competition law and free movement of services.<sup>582</sup> However, UEFA held a strict position in relation to the assessment of the proportionality of the rule which is hardly understandable: it argued that an association

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<sup>576</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>577</sup> See Case COMP/37 806: ENIC/ UEFA.

<sup>578</sup> See Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>579</sup> See Decision in Case COMP/37 806: ENIC/ UEFA., para. 10.

<sup>580</sup> See Rincón, A. (2007). *EC competition and internal market law: On the existence of a sporting exemption and its withdrawal*. Journal of Contemporary European Research, 3(3), 224-237.

<sup>581</sup> See Decision in Case COMP/37 806: ENIC/ UEFA., para. 15.

<sup>582</sup> See Decision in Case COMP/37 806: ENIC/ UEFA., para. 19.

cannot be obliged to divine the least restrictive measures to achieve an objective inherent to the system, and that the Commission cannot substitute its assessment to the expertise of the Association.

Within the Commission's assessment, it pointed out that football clubs have to be considered as undertakings, in light of the economic activities they carry out through advertisement, sponsorship, sale of tickets and media rights. Hence, UEFA represents an association of undertakings, whose decision may be relevant under Article 101 TFEU.<sup>583</sup> Subsequently, the institution confirmed that the object of the rule was not to restrict competition on the market for investors in European football, but to protect the integrity and uncertainty of the results, and to guarantee the perception of consumers. The Commission then moved to consider the effects of the conduct, and referred in this instance to the *Wouters* test. It therefore asked whether the restrictive effects were inherent in the pursuit of the very existence of Pan-European football competitions. The limitation on the freedom to act was considered a necessary and proportionate effect to maintain the competition possible in the long term.<sup>584</sup> Indeed, the uncertainty of the outcome requires protective measures, as the confidence of the public and the perception of the integrity of the competition could be undermined if two entities with a similar ownership structure would meet on the pitch.<sup>585</sup> The Commission therefore applied a proportionality test and assessed the necessity of the rule, as to create a sport integrity justification under EU competition law.<sup>586</sup> Indeed, as the measure was considered not to go beyond what was necessary to achieve its objectives, the Commission rejected the complaint.

In relation to this, it must be noticed how, as opposed to *Meca-Medina*, the private economic interest of UEFA was in this case considered of primary importance in the context of the assessment under the *Wouters* test. In particular, the pursuit of a private

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<sup>583</sup> See Decision in Case COMP/37 806: ENIC/ UEFA, paras. 25 and 26. The Commission in fact argued that UEFA had to be considered an association of the national associations.

<sup>584</sup> See Decision in Case COMP/37 806: ENIC/ UEFA, para. 38. See Weatherill, S. (2012) *EU Sports Law: The Effect of the Lisbon Treaty*. Oxford University Press.

<sup>585</sup> See Decision in Case COMP/37 806: ENIC/ UEFA, para. 32 and See Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>586</sup> See Szyszczak, E. (2007). *Competition and sport*, European Law Review. 32, 1, 95-110.

economic interest was considered legitimate despite the restriction caused, and regardless of the private source of the power held by UEFA. The integrity of sport, and more correctly the public perception of this integrity are considered as inherent characteristics of the sport system, and necessary in order to extract value from the ancillary activities of the clubs.<sup>587</sup> Hence, although the regulation pursued an economic objective, it was not examined under Article 101(3) TFEU, but the analysis remained limited to the nature of the restriction and the application of competition law.

### 2.3 Mouscron

The last case that will be discussed in relation to integrity rules concerns a complaint lodged with the Commission by the Communauté Urbaine de Lille against UEFA.<sup>588</sup> As the local stadium was not complying with UEFA criteria, the Belgian football club Excelsior Mouscron wanted to move to the nearest stadium in order to play the 1997/1998 UEFA Cup matches. Hence it tried to relocate to the city of Lille, just over the border in France, for the match against another French team, F.C. Metz. According to the ‘home and away from home’ rule for UEFA competitions, in two-legged ties clubs must play first in one club’s country and then in the other club’s country.<sup>589</sup> Therefore UEFA did not allow the match to be staged in Lille. This measure had the effect of preventing the Communauté Urbaine de Lille to hire out its stadium to the Belgian club, thereby restricting the market for the rental of football facilities within the territory of the European Union. The city of Lille lodged a complaint arguing that the regulation was infringing Article 102 TFEU, as an abuse of dominant position by UEFA.

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<sup>587</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>588</sup> Limits to application of Treaty competition rules to sport: Commission gives clear signal’, European Commission Press release IP/99/965, 9 December 1999.

<sup>589</sup> UEFA may allow the staging of matches on the territory of other UEFA members Associations for reasons of safety or as a result of a disciplinary measure. See, in relation to the current Europa League, which replaced the UEFA Cup, para. 22.05 of the regulations, available at: [http://it.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/23/69/59/2236959\\_DOWNLOAD.pdf](http://it.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/02/23/69/59/2236959_DOWNLOAD.pdf)

The Commission rejected the complaint, holding that the ‘home and away from home’ rule had to be considered a sport rule that did not fall under the scope of EU competition law. In particular, it held that the rule was indispensable for the organisation of national and international competitions and in order to ensure equality between clubs taking part in the competitions themselves.<sup>590</sup> The organisation of sport under national lines, rather than arbitrarily partitioning the market, may be then considered as one of the inherent elements of the system.<sup>591</sup> In this regard, the Commission argued that the rule is a legitimate expression of the right of self-regulation of a sporting organisation.<sup>592</sup> Unfortunately, the Commission did not fully examine the case, as it underlined the lack of Community interest on the matter. Indeed, this was the first case involving a dispute of this kind, and the Commission maintained that the investigatory measures needed would have been disproportionate in respect to the probability of establishing that an infringement had taken place. Finally, the Commission confirmed that the organisation of sport on a territorial basis was held to fall outside the scope of the Treaty rules on competition.<sup>593</sup>

In the cases discussed so far, the integrity exception under Article 101(1) TFEU was applied to restrictive conduct imposed by collective private bodies, which regulate the sector in the pursuit of private and public interests. The institutions have not negated the restrictive effect of the conduct, and in some instances they even have explicitly recognised the economic motives that underlie them. Therefore, Governing Bodies may legitimately pursue objectives of both public and private interests. The institutions have shown that they are willing to accept the autonomy of private regulators in relation to integrity rules, as long as they can demonstrate that their conduct is necessary and proportionate to achieve their own legitimate aims.

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<sup>590</sup> See the Staff Working Document - Action Plan ‘Pierre de Coubertin’ - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, at para. 2.2.1.2.

<sup>591</sup> In particular, it could be held that reaching national superiority constitutes one of the main element of sport, and the goal behind certain sporting activities. See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p.1158.

<sup>592</sup> See Vermeersch, A. (2007). *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, Journal of Contemporary European Research, Vol. 3, No. 3, pp. 238-254.

<sup>593</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut.

### 3. Regulatory Rules

In this section the case law and the decision practice of the institutions concerning regulatory rules will be discussed, and conclusions will be drawn as to their approach to conduct that may restrict competition under Articles 101 and 102 TFEU.

The second category of sporting rules that will be assessed in this chapter comprises those regulations and conduct that are related to the organisation of the sport system.

In relation to this, the rules express the authority that governing bodies can exercise over their specific discipline. They range from safety rules, to rules concerning the practical organisation of the competition and the events, to rules related to the contractual relationships between sportspersons and clubs and disciplinary matters.

Similar to the integrity rules discussed above, the regulatory rules may aim at guaranteeing the uncertainty of the result of competitions. However, they are clearly capable of restricting the ability and freedom of those engaged in the sporting activity. Furthermore, these rules are set by governing bodies which are also likely to pursue their own commercial interests. There is thus the need to prevent and control any possible conflict of interests, where a regulatory rule may in effect hide an abusive conduct aiming at impairing the activities of competitors. Alternatively, if the autonomy and the expertise of the governing bodies is recognised, then they are legitimately entitled to regulate as they see necessary the various aspects of the system, even when this may encroach the ability of undertakings and competitors, provided that they do so in a proportionate manner.

#### 3.1 MOTOE

One of the most important cases in this regard concerned the conduct of the Greek Automobile Federation, and the conflict between the use of its regulatory power and its commercial role.<sup>594</sup> The case arrived to the Court of Justice as a preliminary ruling on the application of Article 102 and 106 TFEU. The national proceeding was seeing MOTOE, a non-profit organisation that had as objective the organisation of

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<sup>594</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863.



motorcycling events in Greece, confronted with the Greek State and the Greek Automobile Touring Club, ELPA, a non-profit organisation itself representing the International Motorcycling Federation<sup>595</sup> in Greece. ELPA, as representative of the FIM, was granted the power from the State to authorise and sanction motorcycling events in Greece.

MOTOE therefore had to make an application to ELPA for the organisation of the Panhellenic Cup. When this was refused, MOTOE brought an action before the Athens Administrative Court of First Instance, and once this was rejected, to the Court of Appeal. ELPA was the only entity entitled to authorise the organisation of motorcycling events, and it could exercise this power without being subject to any external control. Moreover, ELPA was also organising motor sport events on its own, and it was engaged in related economic activities, such as concluding sponsoring agreements, advertising and other forms of exploitation of the events.<sup>596</sup> MOTOE argued that ELPA was abusing its dominant position under Article 102 TFEU by combining the regulatory power with the role of organiser of motor sport events.

In its assessment, the Court of Justice pointed out that the definition of undertaking, as from *Höfner*,<sup>597</sup> does not depend on the legal status of the entity, or whether it makes profit, or finally whether its activity is related to sport. Indeed, when there is an economic activity, which is merely constituted by the offering of goods or services on the market,<sup>598</sup> even when the entity under assessment does not make profit its competitors would still seek to make profit in order to survive on the market.

The main question to be resolved at this point was related to the public powers that ELPA was exercising, while carrying out its private interests. The Court held that even when an entity is vested with public powers, it will still be classified as an undertaking in relation to the economic activities it carries out.<sup>599</sup> Hence, a sport federation may be considered as not falling under the definition of undertaking in relation to some of its

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<sup>595</sup> FIM hereinafter.

<sup>596</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863, paras. 4 -16.

<sup>597</sup> See Case C-41/90 - *Klaus Höfner and Fritz Elser v Macrotron GmbH*. [1991] ECR I-1979, and *infra* Chap. 2 § 4.1.

<sup>598</sup> See Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7.

<sup>599</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863, para. 25.

activities. However, when it enters into agreements with broadcasters, sponsors, advertisers and other entities, the federation carries out an economic activity, and as such it will be subject to competition law.<sup>600</sup>

Once it had established that ELPA could be considered an undertaking, the Court had to assess whether ELPA was holding a position of dominance on the relevant market, defined as consisting of the organisation of motorcycling events and their commercial exploitation.<sup>601</sup> In relation to this, the Court considered that such a position of strength can be achieved when the undertaking has received rights to the effect that it is able to determine whether and under which conditions its competitors can gain access to the market.<sup>602</sup> As this was the case, ELPA was placed in a clear condition of advantage over its competitors. Moreover, such a rule could give ELPA the power to distort competition by favouring the events that it organised and commercially exploited.

The Court therefore concluded that Article 102 TFEU prohibits a national rule which confers on a legal person, which organises motorcycling events and in that relation enters into commercial agreements, the power to authorise the organisation of other competitions, without that power being made subject to any control.<sup>603</sup> According to this reasoning, undertakings endowed with public powers of this sort are immediately placed in a position of dominance that has to be subject to restrictions and reviews, regardless of whether there is an abuse.<sup>604</sup> However, while undertakings holding a dominant position have a special responsibility not to alter the condition of the competition on the market by abusing of their power,<sup>605</sup> this cannot be extended to

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<sup>600</sup> As mentioned before, see *infra* § 2.1, the same approach has not been adopted in *Meca Medina*, where the IOC and FINA were considered undertakings, regardless of the activity that was examined. See Subiotto, R. (2009) *How a lack of analytical rigour has resulted in an overbroad application of EC competition law in the sports sector*, International Sports Law Review, 21–2.

<sup>601</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863, para. 33.

<sup>602</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863, para. 38.

<sup>603</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863, para. 53.

<sup>604</sup> See Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37, and Miettinen, S. (2008). *Policing the boundaries between regulation and commercial exploitation: Lessons from the MOTOE case*, International Sports Law Journal, 3(4).

<sup>605</sup> See Case 322/81 *Nederlandshce Banden – Industrie Michelin NV v Commission* [1983] ECR 3461, para. 57.

impose regulations even when there is no abuse. Therefore, the State may have to withdraw special rights that have been granted to the sporting bodies to guarantee that they do not abuse their power. Furthermore, there is also the question of whether sporting federations, when they are entrusted with the organisation of competitions, should separate themselves from the commercial exploitation of the product.<sup>606</sup>

While the governance and regulatory structure seen in *MOTOE* is immediately concerning under an antitrust perspective, the exercise of public powers may be legitimate in some circumstances. Indeed, it can be necessary to protect the safety of drivers, athletes in general and spectators. Furthermore, the regulatory power can be legitimately exercised to ensure the uniformity of the competition, and its inclusion in one overarching framework, ultimately in the interest of the public.<sup>607</sup> In any event, it needs to be ensured that these justifications and the restrictions they carry along are proportionate and do not hide preferences given to the events organised or marketed by the federation itself.<sup>608</sup>

In this sense, more detailed guidelines could help the governing bodies to shape their regulatory power and structure in compliance with EU law, by setting standard to be respected and hence avoid a necessary stricter *ex post* control.

### 3.2 FIA

Another case involving the use, or misuse, of regulatory powers by sporting bodies is again related to the world of motor sports. In particular, this second case concerned the system of exploitation of rights adopted by the International Automobile Federation,<sup>609</sup> in relation to the competition it organised.<sup>610</sup>

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<sup>606</sup> See Weatherill, S. (2008) *Article 82 EC and sporting 'Conflict of Interest': the judgment in MOTOE*. *International Sports Law Journal* 3–4, 3-7.

<sup>607</sup> See Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] I-04863, Opinion of AG Kokott, paras 92 -93.

<sup>608</sup> See Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio* [2008] I-04863, Opinion of AG Kokott, para. 95 and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>609</sup> FIA hereinafter.

<sup>610</sup> See Press Release: Commission opens formal proceedings into Formula One and other international motor racing series European Commission - IP/99/434, 30/06/1999.

In 1999, the European Commission opened an investigation after a number of private complaints over the conduct of FIA, holding that the system that the federation put in place for the exploitation of rights arising from the competition was breaching Article 101 and 102 TFEU. In essence, the main problem in this case, much like what has been seen in *MOTOE*, was the conflict of interest existing between the regulatory and the commercial function of the Federation, which allowed it to block the organisation of competing events and foreclose the access to the market to other players.<sup>611</sup>

As the only regulator body of international motor racing in Europe, FIA had the power to grant licenses to anyone who wished to participate in international motor racing competitions. Drivers, track owners, vehicle manufacturers and events organisers that were licensed by FIA were only allowed to take part in the events sanctioned by the federation itself, and prohibited from taking part in any other event. The use of this power was particularly concerning in consideration of the commercial role that FIA itself held, as organiser of motor racing events. Moreover, FIA claimed the broadcasting rights related to all the events it authorised, which were then transferred to a controlled company. Teams participating to the Formula One Championship and promoters of the events were forced to transfer their broadcasting rights to Formula One Administration,<sup>612</sup> created and controlled by FIA. Through this organisation, the Federation entered into contracts with track owners and media partners.

These agreements included provisions which posed significant restrictions to the freedom of the parties. Indeed, thanks to the popularity of its brand, FIA was able to impose a strict loyalty condition on those involved in the system.<sup>613</sup> Hence, broadcasters were not allowed to transmit the images of competitions organized by FIA's competitors, track owners could not use their circuits for races which could

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<sup>611</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>612</sup> FOA hereinafter.

<sup>613</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

compete with Formula One, and teams could not take part in events in competition with Formula One.<sup>614</sup>

The Federation was therefore exercising the role of sporting regulator, by deciding rules and the competitors allowed to take part to the events it organized, and at the same time, through the controlled company FOA, it managed the related commercial rights. This set of arrangements was considered as a possible infringement of Article 101(1) and 102 TFEU, as it gave FIA the power to control, exploit and block the organisation of events in competition with those promoted or organised by the Federation itself.

After the statement of objections, the Commission initiated a series of negotiations with FIA, aiming at discussing and amending the arrangement. FIA finally agreed to amend its rules in order to comply with EU competition law, by restricting its role only to regulator of the sector.<sup>615</sup>

In its press release confirming the Decision to close the investigation,<sup>616</sup> the Commission recognised the need for governing bodies to exercise regulatory powers on their respective sectors. However, the Federation was prohibited from using its powers to prevent the organisation or exploitation of other events, unless this could have been justified for safety reason, or to protect the fair and orderly conduct in motor sport. Under the new arrangement, the Federation had to fulfil a number of conditions: FIA retained its rights over the competitions it organised, but had to remove from the rules any claim over the events it authorises, and any obstacles to the activity of other organisations. FOA as well had to remove provisions penalising broadcasters that wanted to transmit other events in competition with Formula One. FIA had therefore to appoint a commercial right holder, and guarantee access to motor sport to any organization interested, as well as the possibility for teams and circuits owners to

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<sup>614</sup> See Press Release: Commission opens formal proceedings into Formula One and other international motor racing series European Commission - IP/99/434, 30/06/1999.

<sup>615</sup> See Press Release IP/01/120, Commission welcomes progress towards resolving the long-running FIA/Formula One Case, Brussels, 26 January 2001.

<sup>616</sup> See Press Release IP/01/1523, Commission closes its investigation into Formula One and other four-wheel motor sports, Brussels, 30 October 2001.

participate in events other than those organised by FIA itself.<sup>617</sup> Finally, FIA had to remove the provisions that were creating and allowing a conflict of interest. It withdrew from commercial activities in order to safeguard its independence and impartiality as a regulatory body.<sup>618</sup>

The approach taken by the Commission in this case demonstrates the willingness to establish a dialogue with Sports Governing Bodies, which would allow the institution to steer their conduct towards principles of good governance.<sup>619</sup> Rather than imposing amendments, the Commission has therefore instituted a cooperation to resolve the antitrust concerns. However, it is not clear whether the intervention of the institution has fully resolved the question and dispelled these concerns. Indeed, FIA transferred the right to FOA for a period of 100 years, in exchange for a one-off fee. The two companies were closely related, as the FIA Vice-President was also the President of FOA at the time.<sup>620</sup> Although the structure received the approval of the Commission after a monitoring period,<sup>621</sup> the new commercial rights holder was allowed to continue with its previous policies, through low revenue participations to teams and other stakeholders.<sup>622</sup>

In *FIA*, as in *MOTOE*, the analysis of the institutions did not have particular regard to the connection with the world of sport. It was recognised in both cases the need for governing bodies to exercise a regulatory power to guarantee certain conditions, such as safety of participants and spectators, and the fairness of the competition. However, the cases are clearly more related to aspects of management and government of a

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<sup>617</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>618</sup> See European Commission, XXXIst Report on Competition Policy 2001, para. 221 *et seq.*

<sup>619</sup> See Geeraert, A. and Drieskens, E. (2015) *The EU controls FIFA and UEFA: a principal-agent perspective*, Journal of European Public Policy, 22, 10.

<sup>620</sup> See Budzinski, O. (2012), *The institutional framework for doing sports business: principles of EU competition policy in sports markets*, International Journal of Sport Management & Marketing, 11 (1) pp. 44-72.

<sup>621</sup> See European Commission IP/03/1491, Commission Ends Monitoring of FIA/Formula One Compliance with 2001 Settlement, Brussels. As the Commission did not take any further action, it is not possible to study the analysis carried out and the elements considered therein.

<sup>622</sup> Cygan, A. (2007), *Are All Sports Special? Legal Issues in the Regulation of Formula One Motor Racing*, European Business Law Review, Vol. 18 (6), pp. 1327-1352.

specific sector, rather than to the nature of the sporting activity regulated.<sup>623</sup> Indeed, these restrictive arrangements could not be justified under the cultural or societal role of sport, which could hardly be considered relevant in the context of motor sport. In this regard, it is clear how the Federations in *MOTOE* and *FIA* were protecting their own private interests, and their position of dominance on the market. The restriction they were imposing, however, could not be justified as proportionate to achieve some legitimate objectives, which were overridden by the economic interests.

### 3.3 Piau

The last case that will be discussed in this section saw the Court of Justice assessing the compliance of regulatory rules set by FIFA in relation to the activity of football players' agents. The case arose from a complaint to the European Commission lodged by Mr Piau, claiming that the FIFA regulations on players' agents were breaching Article 101 TFEU,<sup>624</sup> by restricting the access to the occupation and the market through the setting of requirements and sanctions, against which there was no possible remedy. These regulations established that players' agents needed to hold a specific licence issued by FIFA, and authorised the Executive Committee of the Federation to set binding rules for agents. The procedure to obtain the licence included an interview to assess the knowledge of the candidate, a check on possible incompatibilities and moral conditions, and the requirement of a bank deposit guarantee of 200,000 Swiss Francs. In the event of a breach of the regulations, a sanction mechanism was provided against players, clubs and agents responsible for the breach, ranging from fines to withdrawal of the licence. Finally, a Players' Status Committee was designated as supervisory and decision-making body.<sup>625</sup>

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<sup>623</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>624</sup> See Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2. In the course of the proceeding, the complainant will also argue that the regulations were in breach of Article 102 TFEU.

<sup>625</sup> See Case T-193/02, *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 4-7.

The Commission initiated a proceeding and sent FIFA a statement of objections in which it was held that the regulations constituted a decision by an association of undertakings under Article 101 TFEU. The regulations were considered to restrict and prevent the access to the market by requiring the agents to demonstrate skills and knowledge, and to pay a large monetary deposit. Furthermore, as these regulations bound all members of FIFA, which included national associations from a high number of EU Member States, and concerned the activity of intermediaries operating within the European Union, they were clearly capable of affecting trade between Member States.<sup>626</sup> FIFA justified the regulations and the restrictions caused under the need of raising ethical standards and the level of professional qualification for players' agents. It then put forward that the regulations should have been subject of exemption under Article 101(3) TFEU.

On 10 December 2000 FIFA adopted a new Players' Agents Regulation,<sup>627</sup> in response to the concerns expressed by the Commission. The new Regulation maintained the obligation to hold a licence issued by a national association. Furthermore, the candidate needs to have an impeccable reputation and take a written test to verify his knowledge of law and sport, and take out a liability insurance policy. Finally, the contract regulating the relationship between the agent and the players must stipulate the agent's remuneration, calculated on the basis of the players' gross salary, or otherwise set at 5% of the salary. Finally, the amended Regulations maintained a number of sanctions for non-compliance with the rules, ranging from a fine to a suspension and withdrawal of the licence.

Following the adoption of the amended Regulations, the Commission rejected the complaint, holding that FIFA had eliminated the main restrictive elements, and hence

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<sup>626</sup> See Antonov, G. (2015) *Is FIFA fixing the prices of intermediaries? An EU competition law analysis*, Asser International Sports Law Blog, 13 May 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/the-new-fifa-regulations-for-intermediaries-and-the-recommended-maximum-remuneration-an-eu-competition-law-analysis-by-georgi-antonov-asser-institute> [last accessed 10 March 2016].

<sup>627</sup> The FIFA Players' Agents Regulations are available at: [http://resources.fifa.com/mm/document/affederation/administration/67/03/46/playersagentsregulations\(edition2001\).pdf](http://resources.fifa.com/mm/document/affederation/administration/67/03/46/playersagentsregulations(edition2001).pdf)



there was no Community interest in continuing the procedure.<sup>628</sup> In particular, the Commission stressed how the new Regulations aimed at raising professional standards and protecting its members from unqualified or unscrupulous agents, and how these objectives had to prevail over competition considerations.<sup>629</sup> Hence, although the requirements set in the Regulations could be deemed to fall under Article 101 TFEU,<sup>630</sup> in light of their restrictive effects, they were held to satisfy the criteria to be exempted under Article 101(3) TFEU.<sup>631</sup> In this regard, the Commission took account of some specific characteristics of the sports industry, such as the brevity of the career of football players, the client receiving the services, and the absence of an organisation overlooking the activity of agents. Their need to be represented by a reliable agent can be fulfilled through the imposition of qualitative restrictions to the access to the profession.<sup>632</sup> However, the reliance of the Commission on Article 101(3) TFEU poses some questions: indeed, the institutions mentioned the legitimacy of the objective pursued through the Regulations, and how the restrictions are necessary and proportionate to it. A correct application of Article 101(3) TFEU, instead, should have given full account of the pro-competitive benefits that the arrangement was likely to create in order to outweigh the restriction.<sup>633</sup> The Commission also held that Article 102 TFEU was not infringed as FIFA was not active on the market for the provision of players' agents' services.<sup>634</sup>

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<sup>628</sup> See European Commission, Decision in Case COMP/37.124.

<sup>629</sup> See Press Release IP/02/585, Commission closes investigations into FIFA rules on players' agents, Brussels, 18 April 2002.

<sup>630</sup> In particular, the mandatory nature of the licence could constitute an entry barrier for the market of players' agents. See European Commission, Decision in Case COMP/37.124, para. 27.

<sup>631</sup> The Commission reaches this conclusion in light of the objective pursued through the regulations, and following the line of reasoning of the Court in *Lehtonen*, and the opinion of the A.G. in *Bosman*, thereby applying a convergence between free movement provisions and competition law. See European Commission, Decision in Case COMP/37.124, para. 29.

<sup>632</sup> See European Commission, Decision in Case COMP/37.124, para. 28.

<sup>633</sup> Moreover, there is a difference between the two provisions in term of the burden of proof. Under Article 101(3) TFEU it is up to the defendant to prove that the arrangement enhances the efficiency on the market. See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed, p. 241, and Case T-168/01 *GlaxoSmithKline Services Unlimited vs. Commission*, [2006] ECR II-02969, para. 235.

<sup>634</sup> Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

Subsequently, Mr Piau brought an action before the General Court for annulment of the decision of the Commission. Mr Piau argued that the Regulations were neither necessary nor proportionate, and that they highlighted the intention of FIFA of taking complete control over the players' agent occupation.<sup>635</sup> In its submission, the Commission justified its decision on the basis that the Regulations were able to satisfy a general interest, and the sanctions provided for therein were inherent in the existence of the rules.<sup>636</sup>

The General Court first confirmed that football clubs have to be considered undertakings under Article 101 TFEU, as they carry out economic activities related to the practice of football. Hence, FIFA is an association of undertakings, as its members are national associations grouping those clubs.<sup>637</sup> The aim of the activity of players' agents is to introduce a player for a fee to a club, or clubs to each other, with a view to employment. The Court therefore identified the occupation of players' agents as an economic activity involving the provision of services, which does not fall within the scope of the specific nature of sport.<sup>638</sup>

According to the General Court, the Players' Agents Regulation adopted by FIFA could not be related to any rule-making powers that may have been conferred on the Federation by public authorities in the pursuit of general interest concerning sporting activity, and could not be comprised under the freedom of internal organisation enjoyed by sports associations either.<sup>639</sup> The General Court assessed the Regulations and upheld the findings of the Commission. The licence system was considered not to eliminate competition on the market, as it resulted in a qualitative selection, appropriate to

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<sup>635</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, para. 56.

<sup>636</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, para. 61.

<sup>637</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 68 - 72. However, the Court has not discussed the nature of undertaking in relation to the activity carried out.

<sup>638</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, para. 73, and the Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, p. 76, and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>639</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, para 74 and see Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague. p.52.

achieving the objective of raising professional standards.<sup>640</sup> The restrictions stemming from the Regulations were therefore held to be justified under Article 101(3) TFEU. However, the Court merely held that the restriction had to be justified, without carrying out a full assessment under Article 101(3) TFEU.<sup>641</sup>

Subsequently, the General Court came to discuss the applicability of Article 102 TFEU. The Court held that FIFA had to be regarded as holding a collective position of dominance on the market for the services of players' agents. If clubs were implementing a decision such as the Regulations, they would present themselves on the market as a collective entity *vis-à-vis* their competitors, their trading partners and consumers.<sup>642</sup> Through the Regulations, they lay down conditions under which the services could be provided. Moreover, FIFA had to be considered active on this market as the emanation of the national association and clubs, which are the actual purchasers of the services.<sup>643</sup>

However, the Court held that the Regulations did not amount to an abuse of dominance either: it merely relied on the fact that the conditions of Article 101(3) TFEU were satisfied as a sufficient ground to hold that an abuse could not be demonstrated.<sup>644</sup> The General Court therefore rejected the complaint, as the rules were considered

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<sup>640</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 100 – 106, and Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

<sup>641</sup> See Vermeersch, A. (2007). *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, Journal of Contemporary European Research, Vol. 3, No. 3, pp. 238-254. For a discussion of the conditions that have to be satisfied in order to grant an exemption under Article 101(3) TFEU, see *infra*, Chap.1, § 5.1.

<sup>642</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, para. 113 and Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>643</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 107 - 116. The Court, however, did not give a detailed account of the conditions of the market in order to establish whether a position of dominance existed. See Colomo, P. (2006), *The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases*, Entertainment and Sports Law Journal, volume 3, number 2.

<sup>644</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 117 – 119 and See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

proportionate and essential to achieve the object.<sup>645</sup> Subsequently, the Court of Justice confirmed the judgment, declaring the appeal inadmissible.<sup>646</sup>

The *Piau* case is particularly relevant in the context of the analysis undertaken in this chapter for a number of reasons. First, it clarified that rules adopted by national or international sports associations are likely to constitute agreements or decisions by association of relevance of public policy also in the context of Article 101(3) TFEU.<sup>647</sup> Although a private body is not supposed to regulate an economic activity,<sup>648</sup> the Court recognised the legitimacy of the objective, and the proportionality of the restriction caused, in relation to the benefits that could be granted to sport.<sup>649</sup> The institutions demonstrated an appreciation of the needs of Sports Governing Bodies to regulate the sector and those who work in it. However, both the Commission and the General Court failed to assess the Regulations properly, and to give comprehensive account of the efficiencies and restrictions created.<sup>650</sup>

From April 2015, FIFA has de-regulated the licensing system for football agents, through the adoption of the Regulations on Working with Intermediaries.<sup>651</sup> According to these Regulations, it is up to National Associations to register intermediaries involved in transactions, and to check that they have an ‘impeccable reputation’.<sup>652</sup> National Association are also responsible for imposing sanctions on those that are

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<sup>645</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 83 - 99.

<sup>646</sup> Case C-171/05 P *Laurent Piau v Commission* [2006] ECR I-37.

<sup>647</sup> See Townley, C., (2011), *Which Goals Count in Article 101 TFEU?: Public Policy and its Discontents*, European Competition Law Review. Available at SSRN: <http://ssrn.com/abstract=1894837>

<sup>648</sup> Schweitzer argued that, in light of the lack of a public rule-setting competence of FIFA, the General Court could not apply the *Wouters* test and had to exempt the Regulations under Article 101(3) TFEU. See Schweitzer, H. (2007) *Competition Law and Public Policy: Reconsidering an Uneasy Relationship. The Example of Art. 81*, EUI Working Papers Law 2007/30, p. 4.

<sup>649</sup> OFT, Article 101(3)—A Discussion of Narrow versus Broad Definition of Benefits: discussion note for an OFT breakfast roundtable (London, Office of Fair Trading, May 12, 2010), available at [http://www.of.gov.uk/news-and-updates/events/roundtable-article101\(3\)](http://www.of.gov.uk/news-and-updates/events/roundtable-article101(3)).

<sup>650</sup> The Regulations were further challenged before the National Court in France. In April 2016, the Court of Appeal of Paris held that sports governing bodies are best placed to regulate their sector and FIFA has the authority to set rules and monitor ethical matters.

<sup>651</sup> FIFA Regulation on Working with Intermediaries, available at [http://www.fifa.com/mm/Document/AFFederation/Administration/02/36/77/63/RegulationsonWorkingwithIntermediariesII\\_Neutral.pdf](http://www.fifa.com/mm/Document/AFFederation/Administration/02/36/77/63/RegulationsonWorkingwithIntermediariesII_Neutral.pdf) [last accessed on 05/05/2016].

<sup>652</sup> See Article 4 of the Regulations. In order to satisfy this requirement, the Intermediary must sign a form certifying that he has no criminal record for ‘financial or violent crime’, he has no conflict of interest and he shall abide to the Regulations. See Annexes 1 and 2 of the Regulations.

subject to their jurisdictions: they are required to implement and enforce the Regulations, but they are entitled to go beyond the minimum standard set therein. Furthermore, the Regulations recommend a cap on intermediaries' remuneration, not to exceed 3% of the player's basic gross income.<sup>653</sup>

This last provision, in particular, has raised criticism and concern, as it could be considered as a form of price fixing,<sup>654</sup> as such strictly prohibited under Article 101(1) TFEU.<sup>655</sup> Indeed, the proposed cap may be considered as a Decision of an Association of undertakings, as the National Associations have been held to be in *Piau*.<sup>656</sup> For this reason, the Association of Football Agents have lodged a complaint with the Commission, holding that that the Regulations would breach EU competition law.<sup>657</sup> It appears that the Regulations contravene the original objective and justification put forward in *Piau*, which was to raise the professional and ethical standards of the agents, in order to protect players. Indeed, the de-regulation and the requirement of 'impeccable reputation' may not guarantee the achievement of the said aims.<sup>658</sup> Furthermore, the Regulations impose a quantitative rather than a qualitative criterion, which is unlikely to constitute an efficient benchmark for the protection of players.

The Commission will therefore have to weigh the regulatory autonomy of governing bodies, which include also the possibility of de-regulating an area, with the objectives of the systems and the rules of the market. This will represent another very important

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<sup>653</sup> See Article 7(3) of the Regulations.

<sup>654</sup> See the Decisions of the Commission in Case COMP/38.549 *Belgian Architects' Association* [2005] OJ L4/10, paras 3 and 4 and in Case COMP/37.975 *PO/Yamaha* [2003] at para 141, and Joined Cases T-213/95 & T-18/96 *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission* [1997] ECR II-1739 paras 159 and 161-164.

<sup>655</sup> See Antonov, G. (2015) *Is FIFA fixing the prices of intermediaries? An EU competition law analysis*, Asser International Sports Law Blog, 13 May 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/the-new-fifa-regulations-for-intermediaries-and-the-recommended-maximum-remuneration-an-eu-competition-law-analysis-by-georgi-antonov-asser-institute> [last accessed 10 March 2016].

<sup>656</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 68 – 72, and note 23 above.

<sup>657</sup> At the moment of writing, the Commission has not adopted any decision in this regard.

<sup>658</sup> See De Marco, N. (2014) *The End of the Licensed Football Agent*, Sports Law Bulletin, 21 October 2014, available at <https://sportslawbulletin.org/2014/10/21/the-end-of-the-licensed-football-agent/> [last accessed 05 May 2016].

step in the context of the discussion of the values that are protected, and the objectives that have to be pursued.

#### **4. Integrity and Regulatory objectives, public policy objectives and efficiency**

The role of Governing Bodies has a fundamental relevance in relation to the legality of both integrity and regulatory rules that they enact. Although this aspect was only touched upon by the General Court in *Piau*,<sup>659</sup> a private body may not be legally entitled to regulate the economic activity of other private individuals or entities. Even when a delegation of public power may be identified, when the regulator is also carrying out an economic activity the exercise of such a power has to be subject to control.<sup>660</sup>

Hence, one of the key aspects to be discussed is the origin of the power exerted by the Governing Bodies. In *Wouters* and *Meca-Medina*, the Court had to assess the legality of restrictive rules laid down by private bodies, respectively deriving their powers from national law and public international law.<sup>661</sup> These bodies were pursuing in fact a public interest: the restrictions were imposed by collective private parties that were designated or implicitly delegated to regulate a specific sector.<sup>662</sup> However, the majority of Sport Governing Bodies do not derive their power from public laws, but from a set of contractual relationships. Nevertheless, their role is to protect the public interest in areas where there is no responsible public authority, or where there is a legislative vacuum.<sup>663</sup>

As primary legislation is unlikely to establish a framework where public interest values are specifically identified and supported,<sup>664</sup> it may be the role of the regulator itself to identify, interpret and possibly achieve the desirable objectives. In any event, a correct

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<sup>659</sup> See Case T-193/02 *Piau v. European Commission supported by FIFA*, [2005] ECR II-209, paras. 77-78.

<sup>660</sup> See Case C-49/07, *MOTOE v. Elliniko Dimosio* [2008] ECR I- 4863.

<sup>661</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>662</sup> In some countries sports governing bodies have been effectively delegated through national legislation. See Siekmann, R, and Soek, J, (2010), *Models of Sport Governance in the European Union: The Relationship between State and Sport Authorities*, International Sports Law Journal, 3/4, pp.93-102.

<sup>663</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands.

<sup>664</sup> See Feintuck, M., (2004), *The public Interest' in Regulation*, Oxford: Oxford University Press, p. 164.

identification of the public interest must follow a hierarchy of values that goes beyond mere economic considerations. Indeed, the pursuit of public interest and the protection of public interest values are ill-fated when the regulation arises from a market-oriented starting point and it focuses on the interest of competitors and consumers, rather than citizens. Therefore, it can be maintained that competition law is not the most efficient tool to regulate the conduct of bodies that pursue public interests. This consideration would explain the approach of the CJEU, seeking to exempt these conduct under Article 101(1) TFEU, rather than by carrying out an assessment of the efficiency created under Article 101(3) TFEU.<sup>665</sup> In this regard, it must be noticed that even where the institutions considered that the public policy exception could have not been applied to the conduct of sporting bodies, they have circumvented the strict application of the law, by adopting an exemption under Article 101(3) TFEU.<sup>666</sup>

The approach taken by the Commission in its Decision practice regarding conduct assessed under Article 102 TFEU follows a similar path. Although the article in question does not have an exempting provision, conduct may be considered lawful if they can be objectively justified.<sup>667</sup> The notion of objective justification may refer to non-economic goals, thereby amounting to a public policy justification similar to the one provided under Article 101(1) TFEU.<sup>668</sup> This common approach and the

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<sup>665</sup> See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International. The choice about carrying out an assessment under Article 101(1) instead of under Article 101(3) TFEU has also consequence in relation to the burden of proof. See Rompuy, B. V. (2015) *The role of EU competition law in tackling abuse of regulatory power by sports associations*, 22 Maastricht Journal of European and Comparative Law 2, pp. 174-204 and Vermeersch, A. (2007). *All's Fair in Sport and Competition? The Application of EC Competition Rules to Sport*, Journal of Contemporary European Research, Vol. 3, No. 3, pp. 238-254.

<sup>666</sup> See *infra*, the Decision of the Commission and the judgment of the General Court in *Piau*. In this regard, however, it has been highlighted how the analysis did not give account of all the elements necessary to exempt the conduct.

<sup>667</sup> According to the Commission Guidance on the application of Article 102 TFEU, *prima facie* abusive conduct may be justified when they are depending on factors external to the dominant undertaking but necessary and proportionate to achieve the objective pursued. See the Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009/C 45/02, at para. 29.

<sup>668</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, The Netherlands and Case C-53/03, *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline* [2005] ECR I-4609, Opinion of AG Jacobs, para. 72.

convergence between the two articles was confirmed by the Commission in its White Paper on Sport, where it held that the *Meca-Medina* test was apt to use in order to assess the compatibility of sporting rules with both Article 101 and 102 TFEU.<sup>669</sup> Further strength to this position is given by the efficiency-type justification under Article 102 TFEU, which mirrors the assessment under Article 101(3) TFEU.<sup>670</sup> The expertise of Governing Bodies can be channelled into pursuing legitimate public objectives. In order to ensure that there are no conflicting or competing interests, it is submitted that a greater degree of cooperation between the private regulators, i.e. Governing Bodies, and the authorities, i.e. EU institutions, may increase the possibility of effectively pursuing public objectives.

## 5. Conclusion

This chapter has provided an analytical overview of the case law and Decision practice of the institutions of the European Union in relation to regulatory and integrity rules adopted by sports governing bodies. Several elements have been underlined in the course of the chapter: the legitimacy of integrity and regulatory rules and the ability of Governing Bodies of framing the rules in a way capable of satisfying public policy will be subject of a more detailed analysis in chapter 7.

The overview of the cases where integrity and regulatory rules have been examined demonstrates how generous the EU institutions have been in recognising the specificity of sport. The need to protect the integrity of the game has been upheld in many occasions, and this objective has been considered legitimate both under the ethical perspective and in light of its economic value. In relation to this, the regulatory autonomy of Sports Governing Bodies have been considered mostly under Article 101(1) TFEU, and therefore exempted as inherent and necessary to the pursuit of a legitimate objective.

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<sup>669</sup> See the Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, para. 3.4, and 2.1.2. The convergence was also confirmed by the Court in DLG. See Case C-250/92, *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvarerelskab AmbA* [1994], ECR I-05641 paras. 35 and 52.

<sup>670</sup> See Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, para. 30.



It is therefore possible to infer that Sports Governing Bodies are free to set and pursue integrity objectives, subject only to a soft proportionality test, with only a minimum level of control exercised over this autonomy. Similarly, Governing Bodies are entitled to set and impose regulatory rules. In order to meet the requirements, and be considered inherent and proportionate to achieve legitimate objectives, Governing Bodies have to present themselves as free from conflicts of interests that could impair the pursuit of their aim.

The institutions have recognised the expertise of the Governing Bodies to set the objective for the benefit of sport. However, in this regard, their autonomy is necessarily conditional to respecting the notion of good governance. This constitutes another form of cooperation between the EU institutions and Governing Bodies, mainly put in place through the Decisions of the Commission and commitments of the undertakings involved. In this regard, the issuing of guidelines from the authorities would certainly improve the transparency, and simplify the activity of SGBs themselves, which would have a clearer idea of the boundaries into which they can exercise their autonomy.

## CHAPTER FOUR: EU Competition Law and the Sports Labour Market

**1. Introduction; 2. The Labour Market; 3. Social Dialogue; 4. The Transfer System in Football; 4.1 Transfer Windows; 4.2 Contractual Stability; 5. Third Party Ownership; 6. Players Mandatory Release; 7. Home-grown Players Rule; 8. Salary Caps; 9. Conclusion**

### **1. Introduction**

This chapter will discuss the rules regulating the labour market within the sporting industry. The labour market and its peculiarities represent one of the main characteristics of the sport system. Therefore, the set of features that characterise the sports labour market and the way it is regulated, or not regulated, by Sports Governing Bodies are important elements to be considered in the context of this thesis. As it was briefly mentioned above,<sup>671</sup> the sports labour market presents a number of features capable of distinguishing it from other sectors and industries. Athletes and players are the main protagonists of sporting events, the reason that fans, customers and advertisers are attracted to them. However, they are also the main factors of production of the industry. It is submitted that a greater engagement of these stakeholders through Social Dialogue would reduce the antitrust concerns and enhance the legitimacy of rules regulating the labour market.

In light of their importance, the level of control that Governing Bodies tend to exercise on the athletes has to be considered with particular care. Many regulatory measures that affect the sport labour market are likely to engage competition law. The restrictions that this form of control are capable of causing may affect clubs, by limiting their ability to buy players on the market, and obviously athletes, as they may condition their freedom to carry out their economic activity. Finally, the regulations of the sports labour market

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<sup>671</sup> See *Sporting Values* chapter, para. 5.3.

may have a significant impact on customers as well, for instance if they were to receive a product of a low quality due to a sub-optimal allocation of the resources.<sup>672</sup>

The aim of this chapter is to analyse the case law and the decision practice of the European institutions when they have been called upon to assess the legitimacy of the regulations of the labour market in European sports. In this regard, however, not only the characteristics of the sports labour market itself, but the features of the sports system more in general have to be taken into consideration. Governing Bodies have stressed on many occasions the need to maintain restrictions on the freedom of athletes and workers, as necessary to guarantee the viability of the system. The discussion of the legitimacy of the restrictions and the objectives therein pursued is fundamentally connected with the debate around the claim for self-regulation of the sport system.<sup>673</sup>

Two aspects are particularly relevant in the context of the analysis that will be undertaken in this chapter. On the one side, the dominant position that Governing Bodies are likely to exercise may also affect the ability of clubs, players and athletes, as undertakings, to carry out their economic activities, through restrictions of different sorts. This question has with time gained increasing importance, especially where Federations were prohibiting individual athletes from taking part in certain competitions organised by other entities and not officially sanctioned.<sup>674</sup> This is an expression of the regulatory autonomy that governing bodies can exercise over the various stakeholders, as long as it complies with the provisions of law.

On the other hand, the very small diffusion of collective bargaining agreements in the sporting industry favours the conclusion of restrictive arrangements that tend to pursue the interests of Governing Bodies for the most part. In turn, this creates more favourable conditions for the issuing of complaints by those that are subject to the power of Governing Bodies. One element that can now be taken into account is related

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<sup>672</sup> See Ross, S. F. (2003). *Competition Law as a constraint on Monopolistic Exploitation by Sport Leagues and Clubs*, Oxford Review of Economic Policy, 19(4), 569–584.

<sup>673</sup> See Gardiner, S. and Welch, R., (2007), *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'?*, Entertainment and Sports Law Journal.

<sup>674</sup> One of the most actual example is the Complaint lodged with the European Commission against the International Skating Federation. See European Commission, Press Release IP/16/3201 - Antitrust: Commission sends Statement of Objections to International Skating Union on its eligibility rules. Brussels, 27 September 2016.

to the application of Article 165 TFEU. Although most of the cases discussed in the chapter predate the adoption of the provision, it is important to consider whether its application would have affected the matter in any way. In relation to this, Social Dialogue should represent a useful tool to provide employers and employees with a forum to facilitate the conclusion of legal agreements that could also be considered to pursue the openness and fairness of the system. These agreements may then be falling out of the scope of EU competition law, in light of the social objective that they are considered to pursue.<sup>675</sup>

In this chapter, the emphasis will be placed on the most relevant arrangements that are capable of affecting the sports labour market within the EU sports system. The aim is to discuss these aspects and draw some conclusions as to the application of EU competition law to the sports labour market. In particular, an original contribution to the body of knowledge will be provided by focussing the discussion on the objectives that are protected in the sports labour market. Indeed, the chapter will highlight the relationship between the regulatory autonomy of sports Governing Bodies, the EU institutions and the market principles in relation to the sports labour market.

## **2. The Labour Market**

The sports labour market is characterised by a high mobility of players and workers in general.<sup>676</sup> For this reason, the sports market has been considered as the main example of European integration,<sup>677</sup> in light of a high degree of cross-border mobility and a truly European dimension. Moreover, the market is very fluid and dynamic, in light of the ephemeral nature of sporting activity: sportspersons tend to have short careers, and sudden injuries can shorten even more their period of activity.

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<sup>675</sup> See Joined Cases C-115/97, C-116/97 and C-117/97, *Brentjens Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-6025.

<sup>676</sup> See Kessenie, S. (2007), *The Peculiar International Economics of Professional Football in Europe*, Scottish Journal of Political Economy. 54 (3) pp. 388-399. This consideration is especially true for team sports.

<sup>677</sup> See KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), at p.6, and see also Kuper, S., & Szymanski, S. (2012). *Soccernomics: Why England loses, why Germany and Brazil win, and why the U.S., Japan, Australia, Turkey and even Iraq are destined to become the kings of the world's most popular sport*. New York: Nation Books.

The sports labour market can be identified as the supply market for the sport industry. Athletes and players constitute the main supply source for clubs that operate on the market and purchase their services.<sup>678</sup> This market can then be divided into three sub-markets. In a primary market, there are those players that are considered superstars. Here we can find a small number of athletes, which, in light of their value, have a significant bargaining power against clubs, which is reflected in high transfer fees and high wages. Therefore, only a restricted pool of rich clubs can get access to this market. On a second level, a limited number of players will offer their services to a high number of clubs: the bargaining power of the players will be reduced and they will not be able to negotiate wages comparable to those offered on the primary market. Finally, there is a third-level market, where a large number of players compete to be signed by a limited number of clubs. In this latter market, clubs have significant bargaining power in determining the players' wages.<sup>679</sup>

As it can be understood from this brief introduction, one of the main elements characterising the sports labour market is the regulation of the transfer of players between clubs. Within team sports in Europe, the transfer of players from a team to another is regulated by a set of rules, standardised at international level by the International Federations. These rules are an expression of the free will of the relevant associations, and they are the epitome of the self-regulatory power held by international and national sports organisations.<sup>680</sup> Regardless of their content and the subject to whom they are addressed, they are not the result of negotiations between management and labour, and they do not aim at improving the working conditions of the employees. They hence cannot enjoy a general exemption from competition law.<sup>681</sup>

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<sup>678</sup> See Egger, A. and Stix-Hackl, C. (2002), *Sports and Competition Law: A Never-Ending Story?*, European Competition Law Review, 23/2, pp. 81 – 91.

<sup>679</sup> KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), pp. 4-5. It is argued that, due to the number of clubs active on each market, the first market has a monopoly structure, the second an oligopoly structure and the third represents an oligopsony.

<sup>680</sup> See KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), p. 33.

<sup>681</sup> See Egger, A. and Stix-Hackl, C. (2002) 'Sports and Competition Law: A Never-Ending Story?' European Competition Law Review, 23/2, pp. 81 – 91.

In any other industry, employees are free to change their employers, breach the contract and pay a sum due as compensation for the breach.<sup>682</sup> Conversely, the transfer rules in sport impose forms of contractual stability between clubs and players, and hence between employers and employees, that cannot be observed elsewhere. They limit the mobility of athletes by requiring the payment of transfer fees between clubs,<sup>683</sup> in order to prevent a total ban on players' mobility. Most of the associations prevent clubs from registering new players after a certain point of the season. Indeed, the transfer system that many leagues and associations have in place allows players to move from one club to another only during a limited time, usually less than four months every given year, and only with the consent of the current employer.<sup>684</sup> Furthermore, contracts can be terminated by either party, without incurring sanctions, only in the presence of a 'just cause'.<sup>685</sup> The consequence of the combination of these aspects is that transfer fees have significantly and progressively increased since 1995.<sup>686</sup> Therefore, the system may also reduce the ability of clubs to compete in the market for the best players, as only elite clubs will be able to afford high transfer fees. This means that the access of clubs to their only source of supply is restricted, but it ultimately produces effects on the exploitation market as well. Indeed, the system is capable of preventing economically weaker clubs from enhancing the quality of their sporting performance, and hence make their product more attractive to consumers.<sup>687</sup>

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<sup>682</sup> See Gardiner, S. and Welch, R., (2007), *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'?*, Entertainment and Sports Law Journal.

<sup>683</sup> In order to play in a competition, an athlete has to be registered with a club. The transfer fee is therefore related to the payment that a club requires to release the player's registration to the club that wishes to employ him. See Pearson, G. (2015). *Sporting justifications under EU free movement and competition law: The case of the football 'Transfer system'*. European Law Journal, 21(2), 220-238.

<sup>684</sup> See Pearson, G. (2015). *Sporting justifications under EU free movement and competition law: The case of the football 'Transfer system'*. European Law Journal, 21(2), 220-238.

<sup>685</sup> KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), at p. 20. Other conditions may apply as well. In football, the existence of a 'just cause' and related disputes have to be decided by the FIFA Dispute Resolution Chamber. This is an arbitration panel to which players are obliged to refer disputes, as opposed to access to ordinary courts of law. See FIFA Statutes, Articles 64(2) – (3).

<sup>686</sup> In particular, starting from the *Bosman* judgment. See KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), at p.10.

<sup>687</sup> See Egger, A. and Stix-Hackl, C. (2002), *Sports and Competition Law: A Never-Ending Story?*, European Competition Law Review, 23/2, pp. 81 – 91.

The transfer system in team sports has been assessed on a number of occasions.<sup>688</sup> It is indeed apparent how limiting the ability of a worker to quit his job and seek other employment opportunities within the same industry represents a restriction of his freedom of movement and freedom to provide services. Therefore, the legality of transfer windows has already been examined under the provision protecting the freedom of movement of workers.<sup>689</sup> The Court has held that transfer windows are likely to constitute a restriction. However, provided that the restriction is proportionate, it can be justified under non-economic grounds, such as the need of ensuring the regularity of the competition, and the proper functioning of the championship as a whole.<sup>690</sup>

While the same regulations could pose restrictions also under EU competition law, the Court has been more reluctant to express its position in this regard.<sup>691</sup> Indeed, regulatory arrangements affecting the labour market are also likely to have an impact on the undertakings active on the sports market. It can be the case of clubs, whose ability to recruit players is restricted by rules such as transfer windows and salary caps. Obviously, these regulations may also affect individual athletes, who can also be defined as undertakings, in light of the ancillary activities related to sport that they carry out.<sup>692</sup>

On the other hand, a number of justifications have been put forward by Sports Governing Bodies to defend the restrictions that the arrangements impose on the labour market. Governing Bodies tend to rely on the need to protect the solidarity within sport,

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<sup>688</sup> See the judgments of the Court of Justices in the cases *Bosman*, in relation to nationality requirements and contractual stability; *Lehtonen* on the legality of transfer windows; and *Bernard* on training compensation.

<sup>689</sup> See, amongst others, Cases C-176/96, *Lehtonen et al v. FRBSB* [2000], ECR I-02681, and C-415/93, *Union des Associations Européennes de Football (UEFA) and others v Jean-Marc Bosman*, [1995] ECR I-04921.

<sup>690</sup> See *Lehtonen*, paras. 52 – 54.

<sup>691</sup> It has to be reminded how the Court of Justice in *Bosman* refused to assess the compatibility of the football transfer window with EU competition law, as it had already held that the system was infringing freedom of movement of workers and freedom to provide services. As such, there was no need to examine also its compatibility with EU competition law. See *Bosman*, para. 138. Similarly, in *Lehtonen* the Court did not consider the question, holding that it did not receive enough information from the national court to decide on the issue. See *Lehtonen*, para 107.

<sup>692</sup> See Case C-51/96, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo*, [2000], ECR I-02549, at para. 13.

the redistribution of resources amongst clubs to enhance competitive balance, and the development of young athletes.<sup>693</sup> Indeed, rules imposing contract stability in team sports can address the need for stabilising relations between clubs and athletes: this would protect the stability of the competition, by ensuring that teams will not sign decisive players at a critical point of the season.<sup>694</sup>

These objectives may be pursued through rules that - at the moment of the transfer - sets compensations for the costs borne by the club for the training of the athletes. This can both compensate the small clubs for their loss, and constitute an incentive for the investments in youth development.<sup>695</sup> Similarly, the setting of transfer fees may be based on a positive interest, aiming at putting the party that has suffered the breach of contract in the position it would have been if the contract would have been performed properly.<sup>696</sup>

The need to provide incentive to the funding of youth development is related to another characteristic of the sports labour market, which has to nurture its talents within the system itself. Indeed, as opposed to the College system that is the rule in North America, in Europe teams have to develop players through their own academies. Hence, clubs will have to invest in order to produce talent, which may then be used in the squad, or sold on the market. Therefore, youth development is an objective of clubs and sports associations in general and it is important to assess the value recognised to this training process, and how it can be protected. This aim has been recognised as legitimate on multiple occasions,<sup>697</sup> as it can also be considered fundamentally related

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<sup>693</sup> See *Bosman*, para. 106, and Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010], ECR I-02177, at para. 39. See also KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), at p 7.

<sup>694</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 578.

<sup>695</sup> See Parrish, R. (2015), *Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law*, Maastricht Journal of European and Comparative Law, 22(2) 256-282. Training compensation and youth development have been recognised by the Court of Justice as legitimate objectives. See Case C-325/08, *Olympique Lyonnais SASP v Olivier Bernard and Newcastle UFC* [2010], ECR I-02177, para. 45.

<sup>696</sup> This is a principle that has been applied by the Court of Arbitration for Sport in *Matuzalem*, see CAS 2008/A/159. See also Wild, A (2012), *CAS and Football: Landmark Cases*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague, p.101.

<sup>697</sup> See the Judgment of the Court of Justice in *Bosman*, at para. 106 and *Bernard*, at para. 39.



to the cultural and educational value of sport. However, the need of training employees is common to any industry and to all the employers, certainly if they want to enhance the benefits received from them whilst in the company or in the sector.<sup>698</sup>

In this regard, therefore, it is important to assess whether, and to what extent, these justifications have been accepted by the Competition authorities. The upholding of these characteristics, which may be legitimately considered as one of the fundamental elements of the specificity of sport, represents a clear example of the regulatory autonomy of Sports Governing Bodies against the strict application of competition law.

### **3. Social Dialogue**

Collective bargaining agreements are a powerful tool through which restrictive arrangements can find a safe harbour from EU competition law. This is the case in the North American sports system, where strong labour market regulation is made up of arrangements such as salary caps, draft system, free agency and restrictions on players' mobility.<sup>699</sup> These instruments aim at allocating talent efficiently amongst the competitors, in order to avoid dominance by a few clubs, and prevent them from monopolising the market for players. However, all these arrangements have to be agreed between employers and employees through a collective bargaining agreement process.<sup>700</sup>

On the other hand, it must be noticed that in Europe, despite a history of unionised working classes, collective bargaining agreements are still not common in sport. This is particularly relevant since collective bargaining agreements would fall out of the scope of application of EU competition law, in light of the social policy objectives that

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<sup>698</sup> See Weatherill, S. (2000), *Resisting the Pressure of Americanization: The Influence of European Community Law on the European Sports Model*, *Williamette Journal of International Law & Dispute Resolution*, 8, 37.

<sup>699</sup> The draft system limits the competition between clubs to sign players that come into the league, by granting to the last classified team at the end of one season the possibility of selecting the best player. Salary caps limit the wage payable by clubs. Free agency defines a situation in which a player is out of contract and free to sign with any team. See KEA/CDES, *'Study on the Economic and Legal Aspects of Transfers of Players'* (European Commission, 2013), p. 81 *et seq.*

<sup>700</sup> See Halgreen, L. (2004), *European Sports Law – A Comparative analysis of the European and American models of Sport*, Folarget Thomson Publishing, Copenhagen.

underpin them.<sup>701</sup> In this regard, one of the innovations brought about by the European Union is the Social Dialogue, a forum where social parties and stakeholders can discuss employment related matters.<sup>702</sup>

Social Dialogue is regulated by Articles 153 – 155 TFEU.<sup>703</sup> According to these provisions, the Commission is responsible for promoting and supporting Social Dialogue, which consists of a forum where both sides of the industry can discuss employment related issues, that ideally result in collective agreements.<sup>704</sup> When the social partners have successfully reached an agreement, this may be implemented in two ways. The parties may decide to have the Council ratify the agreement through the adoption of a Directive. In this scenario, the agreement becomes part of EU law as soon as it is implemented by Member States, which are bound to achieve the result set through national legislation or national collective agreements. This outcome would represent the best example of co-regulation, whereby the institutions set up the framework and ratify the content of a legislative measure drafted by social partners and industry stakeholders. Alternatively, the agreement may be implemented under the voluntary route, through customary national procedures.<sup>705</sup> This latter type of agreement would bind only its signatories and their affiliates, and it would require a

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<sup>701</sup> Indeed, when these agreements are reached between employers and employees and aim at improving the working conditions, the social policy objectives they pursue would be undermined if they would be subject to the application of competition law. See Case C-67/79, *Albany International v Stichting* [1999] ECR I-5751, at para. 59, and Case C-115/97, *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* [1999] ECR I-06025, at para. 56.

<sup>702</sup> The objective is therefore to enhance dialogue between stakeholders, reduce recourse to litigation, and ensure that EU law rights and freedoms penetrate within private regulatory arrangements without public enforcement proceedings. See Parrish, R. (2011), *Social Dialogue in European Professional Football*. European Law Journal, 17: 213–229.

<sup>703</sup> Article 153 TFEU establishes the possibility of action taken at Community level to improve employment conditions. Article 154 grants the representatives of employees and employers the right of consultation and review on proposals of the Commission in the field of social policy, and even affect the subject of the Commission legislative proposal if they have been able to reach a Community-wide agreement. Moreover, according to Article 155, the social partners can initiate their own process aiming at an agreement, independently from a proposal of the Commission.

<sup>704</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>705</sup> See Article 155(2) TFEU and Parrish, A. (2016) ‘The European Social Dialogue: A New Mode of Governance for European Football’, in Duval, A. and Van Rompuy, B. (eds.) *The Legacy of Bosman, Revisiting the Relationship between EU law and Sport*, T.M.C. Asser Press, p. 193.

stronger commitment on behalf of the participants and the governing bodies overseeing the arrangement.

Only certain types of organisations can take part in social dialogue: they have to be organised at European level and have the capacity to negotiate agreements. Furthermore, they need to have adequate structures to ensure effective participation. Finally, all the social partner organisations have to apply jointly to the European Commission for the creation of the instruments in that particular sector.<sup>706</sup> The selection of the social partners has particular relevance in light of the importance of their role, as they will be recognised as relevant bodies for the EU policy-making process.

As already noted, the *Bosman* ruling liberalised the players' market and created the conditions for a process of Europeanisation of labour relations in sport, and especially in football.<sup>707</sup> Following the 2001 Informal Agreement between UEFA, FIFA, and the European Commission,<sup>708</sup> the EU institution invited the Federation and the clubs to make use of the Social Dialogue instruments to enter dialogue with representatives of the players on matters related to the employment relationship in the sporting sector.<sup>709</sup> Indeed, the outcome of that negotiation on the transfer system, which involved a number of industry stakeholders and European institutions, convinced the Commission to offer political support to the instruments of Social Dialogue in the sports sector.<sup>710</sup>

The first and so far only example of Social Dialogue in sport was set up in relation to professional football. The representative social partners were the European Professional

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<sup>706</sup> See Article 1, Commission Decision 98/500 of 1998 on the establishment of Sectoral Dialogue Committees promoting the dialogue between the social partners at European level.

<sup>707</sup> See Parrish, R. (2011), *Social Dialogue in European Professional Football*. European Law Journal, 17, p. 224.

<sup>708</sup> See Garcia, B., (2011), *The informal agreement on the international transfer system*, European Sports Law and Policy Bulletin, I-2011, pp. 17-29.

<sup>709</sup> See *ibid*, at p. 221 and see Commission of the European Union. Commission White Paper on Sport, COM (2007) 391 final, at para. 5.3. The Commission has further expressed its support for the use of Social Dialogue in Sport in its 2011 Communication on Developing the European Dimension in Sport. See Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Developing the European Dimension in Sport {SEC(2011) 66 final} {SEC(2011) 67 final} {SEC(2011) 68 final}, p. 13.

<sup>710</sup> See Parrish, A. (2016) 'The European Social Dialogue: A New Mode of Governance for European Football', in Duval, A. and Van Rompuy, B. (eds.) *The Legacy of Bosman, Revisiting the Relationship between EU law and Sport*, T.M.C. Asser Press, p. 194.

Football Leagues<sup>711</sup> and the European Clubs Association<sup>712</sup> on the side of the employers,<sup>713</sup> and FIFPro<sup>714</sup> on the side of the employees. After the joint request of FIFPro and EPFL, the Commission recognised the existence of the conditions for the setting up of an EU Social Dialogue Committee in the professional football sector. The social partners agreed to include UEFA in the process, as an associated partner. This is an exception, as Governing Bodies are not supposed to have access to the social dialogue process.<sup>715</sup> The role of the Federation within the Social Dialogue Committee may indeed jeopardise the independence of the latter, and hence its legitimacy.<sup>716</sup>

In 2012, the Social Dialogue Committee managed to reach an agreement on minimum requirements for professional football players' contracts.<sup>717</sup> This agreement establishes the basic rights and obligations of clubs and players, and matters that have to be included necessarily in the contract, such as the salary and provision of health insurance. The substance of the contract will still have to be agreed between clubs and players, at least until the social partners reach a further agreement on the subject.

The impact of the agreement is limited in relation to two main aspects. First of all, the social partners agreed merely on minimum standards. These standards are already respected in a number of EU Member States, which do not have to implement the agreement. Second, the way chosen to implement it was the voluntary one. This method of implementation meets the resistance of Member States, which are not bound by the agreement. The signatories have to commit to ensure the implementation on

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<sup>711</sup> EPFL hereinafter.

<sup>712</sup> ECA hereinafter. Originally ECA was not considered as a representative of the clubs. In 2008, UEFA signed a Memorandum of Understanding with ECA, where its role was established. ECA is constituted by clubs representative of the 53 national associations. Membership of ECA depends on the ranking of the national associations' members.

<sup>713</sup> See Pijetlovic for a discussion on the true representative nature of these organisations. The author argues that ECA and EFPL are likely to represent adequately only the interests of their top members, regardless of their wider constituency. Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>714</sup> FIFPro is the worldwide representative for professional footballers.

<sup>715</sup> See Parrish, R. & Miettinen, S. (2009), *The sporting exception in European Union law*, T.C.M. Asser Instituut. The inclusion of the governing body may cause the ineligibility of the agreements concluded, or of some of the aspects that they regulate, under the competition law exemption.

<sup>716</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>717</sup> Autonomous Agreement on Minimum Requirements Standard Players Contracts, available at <http://www.ecaeurope.com/Documents/Dialogue%20social%20IX%20Final%20Version.pdf>

their territory through the most appropriate instruments. However, this results in different possible outcomes.<sup>718</sup>

In any event, the role and the importance of the Social Dialogue instrument in the sporting sector could be significantly expanded in the future.<sup>719</sup> Its application in the sporting sector responds to a position expressed by the Commission in the White Paper on Sport, where the institution argued that governance issues in sport should be dealt with according to a self-regulatory approach, provided that the principles of good governance are fully respected.<sup>720</sup> The use of social dialogue in the sporting sector is also supported by EU primary legislation, as Article 165 TFEU states that the action of the Union shall be aimed at promoting cooperation between bodies responsible for sports.

On the other hand, the institution of Social Dialogue, rather than enhancing the self-regulatory approach in sport, confirms a shift from the logic of pure autonomy and hegemony of Governing Bodies over the sports system, toward an acceptance of a co-regulation approach.<sup>721</sup> In relation to this, a number of stakeholders would take part in the regulatory process, whereby EU law would provide the framework allowing the expression of autonomy within boundaries.<sup>722</sup> The absence of a strong EU competence over sport reduces the number of alternatives available to regulate the system. Social Dialogue may therefore be seen as the most effective way of co-regulating the sporting sector.

It is for this reason necessary that both the European institutions and Governing Bodies vigorously support Social Dialogue, as the most effective and viable tool to achieve

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<sup>718</sup> See Parrish, A. (2016) 'The European Social Dialogue: A New Mode of Governance for European Football', in Duval, A. and Van Rompuy, B. (eds.) *The Legacy of Bosman, Revisiting the Relationship between EU law and Sport*, T.M.C. Asser Press, p. 200.

<sup>719</sup> The Study on the Transfer of Players recommended that the Committee should consider amongst the others the matters of protection of minors, excessive transfer fees, fair and balanced competitions and rules related to non-EU players. See KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), at p. 8.

<sup>720</sup> See Commission of the European Communities. Commission White Paper on Sport, COM (2007) 391 final, at para. 4.

<sup>721</sup> See Geeraert, A. (2015), *The European sectoral social dialogue committee in professional football: power relations, legitimacy and control*, Soccer & Society, 16, 1.

<sup>722</sup> See Foster, K. (2011), *The Juridification of Sport*. Available at SSRN: <http://ssrn.com/abstract=1959909>  
Parrish, R. (2011), *Social Dialogue in European Professional Football*. European Law Journal, 17: 213–229.

favourable results in the area of European sports policy. It is also important to convince national affiliates and Member States to give a strong mandate to negotiate at EU level, by identifying clearly the added value for their members. This effort would help to achieve two results. First, it would allow Governing Bodies to retain some level of control and autonomy over the regulation of the sector. Second, it would strengthen the cooperative relationship with the EU institutions, which would provide the overarching framework for the instrument. Under the Social Dialogue umbrella, regulatory rules may be strengthened and find further legitimisation. Indeed, so long as the matter pertains to the employment relationship between clubs and players, an agreement could provide a regulative framework for the transfer of players, contractual issues, image rights and solidarity payments to name but a few.<sup>723</sup>

However, the need of ensuring a true representative nature of the participants cannot be ignored. The role of UEFA and Governing Bodies has to be limited: at this stage, UEFA is capable of exercising a significant level of control on the activity of the Social Dialogue Committee on professional football. Indeed, the Association not only chairs the Committee in light of its expertise, but every item discussed in the Committee has to be approved by the Professional Football Strategy Council, a consultative body within UEFA created to build a network for social dialogue and consultation in the governance of professional football.<sup>724</sup> Finally, Social Dialogue does not require the inclusion in the process of all the possible stakeholders of a specific industry. Indeed, in relation to sport, fans, final consumers and other investors at various stages of the production are not adequately represented. It is, therefore, clear that commercial arrangements that would affect them negatively could not be justified even if agreed within the process of Social Dialogue.

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<sup>723</sup> See T.M.C. Asser Institute, Edge Hill University and the Katholieke Universiteit Leuven, *Study into the Identification of Themes and Issues which can be Dealt with in a Social Dialogue in the European Professional Football Sector*, Report for the European Commission (May 2008). Other objectives may be considered as well, as the goals outlined in Article 165 TFEU, such as fairness and openness in sporting competitions, cooperation between bodies responsible for sports, and the protection of the physical and moral integrity of sportsmen and sportswomen. See Parrish, R. (2011), *Social Dialogue in European Professional Football*. *European Law Journal*, 17: 213–229.

<sup>724</sup> See Geeraert, A. (2015), *The European sectoral social dialogue committee in professional football: power relations, legitimacy and control*, *Soccer & Society*, 16, 1.

#### 4. The Transfer System in Football

While areas of the sports labour market have been left to the regulatory autonomy of Governing Bodies, other aspects have instead been regulated through agreements between Regulatory Bodies and the European Commission. One example of this form of cooperation<sup>725</sup> is the 2001 Informal Agreement on the International Transfer System, which was struck between the European Commission and UEFA.<sup>726</sup> This measure, a non-legally binding settlement, was the result of a dispute that started some time before with *Bosman*.<sup>727</sup> Prior to the judgment of the Court, the FIFA players' registration system allowed clubs to retain the registration of their players even after the expiry of their contract, unless a transfer fee was paid by the new club. In its judgment, the Court maintained that the transfer system in place at the time was inadequate to achieve its legitimate objectives, namely protecting the competitive balance between clubs, as it restricted the freedom of movement of players in a way that was disproportionate to them.<sup>728</sup> However, the decision of the Court considered only out-of-contract players: the legality of transfer fees for players under contract was not assessed.<sup>729</sup>

After the Court established that the transfer system in place at the time was in breach of EU law, the Commission put pressure on UEFA to amend it, in order to avoid any further legal action. Hence, in 1998 the Commission opened an investigation against FIFA, which at the time was responsible for the regulation of the international football

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<sup>725</sup> This form of cooperation is vertically imposed by the authorities. It can be better defined as a form of condition autonomy, whereby the activity of the regulator is steered through the use of Decisions and investigations.

<sup>726</sup> See European Commission, Press Release IP/01/314, Outcome of discussions between the Commission and FIFA/UEFA on FIFA Regulations on international football transfers, Brussels, 5 March 2001. For a complete overview of the agreement and the process that led to its conclusion, see Garcia, B., (2011), *The 2001 informal agreement on the international transfer system*. European Sports Law and Policy Bulletin, I-2011, pp. 17-29.

<sup>727</sup> See *supra* Sporting Value chapter, ¶ 7.

<sup>728</sup> See Weatherill, S. (2000), *Resisting the Pressure of Americanization: The Influence of European Community Law on the European Sports Model*, Williamette Journal of International Law & Dispute Resolution, 8, 37, and *Bosman*, at para. 107.

<sup>729</sup> See Pearson, G. (2015). *Sporting justifications under EU free movement and competition law: The case of the football 'Transfer system'*. European Law Journal, 21(2), 220-238. On the other hand, it could be argued that the Commission has accepted a fee based transfer system for players under contract through the 2001 Agreement. See Berry, A. (2012), *Challenging Football Transfer Windows: A disproportionate response to a legitimate aim*, Sport & Law Journal, 20, 1.

transfer system that was in place in Europe, as well as in the rest of the world.<sup>730</sup> Indeed, the system presented a number of features that were capable of breaching Article 101 TFEU. First, unilateral termination of the contract was prohibited: even after a player had broken his contract with a club, and paid damages for the breach, he was still not allowed to register with another club in another country.<sup>731</sup> Second, the transfer fee, which was agreed freely by the parties involved, did not have to be in any way related to the costs borne for the training or the development of the player, thereby possibly leading to excessively high fees. Finally, national associations were obliged to implement the same system within their domestic transfer regime, and clubs and players were prevented from taking disputes related to transfers to civil courts. The arrangement could thus be considered as a decision of an association of undertakings that distorted the competition on the market for signing players.

The investigation had the effect of convincing FIFA, UEFA and a number of national leagues to initiate a dialogue with the European Commission.<sup>732</sup> The discussion led to the adoption of the new FIFA rules on International Transfers.<sup>733</sup> This constitutes an example of the shift that has started to occur from a vertical and hierarchical system, to a horizontal model where networks of stakeholders collaborate to define the rules.<sup>734</sup>

The Commission then closed its investigation, satisfied by the amendments put in place by FIFA.<sup>735</sup> The institution, however, did not expressly exempt the arrangement under Article 101(3) TFEU, and it did not hold that the arrangement was inherent to the

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<sup>730</sup> See Garcia, B. and Meier, H. (2012), *Limits of Interest Empowerment in the European Union: The Case of Football*, Journal of European Integration, 34/4, p. 363.

<sup>731</sup> See Parrish, R. (2003), *Sports Law and Policy in the European Union*, Manchester: Manchester University Press, p.141.

<sup>732</sup> They were later joined by the FIFPro, as the representative of Football players.

<sup>733</sup> FIFA Regulations for the Status and Transfer of Players, July 2001. The latest version can be found here [http://www.fifa.com/mm/document/affederation/administration/regulations\\_on\\_the\\_status\\_and\\_transfer\\_of\\_players\\_en\\_33410.pdf](http://www.fifa.com/mm/document/affederation/administration/regulations_on_the_status_and_transfer_of_players_en_33410.pdf) [last accessed on 06 May 2016].

<sup>734</sup> See Duval, A. (2016) 'The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman', in Duval, A. and Van Rompuy, B. (eds.) *The Legacy of Bosman, Revisiting the Relationship between EU law and Sport*, T.M.C. Asser Press, p. 91.

<sup>735</sup> See European Commission (2002), Commission Closes Investigations into FIFA Regulations on International Football Transfers, IP/02/824, 05/06/2002. By this time, however, FIFPro had withdrawn from the negotiation and was not part of the final agreement.



pursuit of a legitimate objective either, but it simply discontinued the procedure.<sup>736</sup> According to the Press Release, the new rules struck a balance between the freedom of movement of players and the need to protect the integrity of sport, the stability of contracts, and the stability of championships.

The new arrangement abolished transfer fees for players who move to a club in a different Member State at the expiration of their contract. The Regulations hence replaced the old transfer fees, declared illegal in *Bosman*, with a training compensation scheme.<sup>737</sup> Indeed, as the Court had recognised the training of young players as a legitimate objective,<sup>738</sup> FIFA decided to link that specific aim to the payment of a fee. This has to be paid to the club that lost the player at the end of the contract, but it has to be calculated in relation to the real costs incurred for his training. Furthermore, in order to protect contract stability, the system created one transfer period per season, with a mid-season window, and imposed a limit of one transfer per player per season. Sanctions were provided against unilateral breaches of contract, whether carried out by the players or the clubs.

#### 4.1 Transfer Windows

One of the first aspects that should be considered in relation to the sports labour market is the existence of transfer windows. In football, players can move from one club to another, and be registered by the latter, only during two fixed periods, one during the summer break and a short one in winter.<sup>739</sup> As previously discussed, FIFA made

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<sup>736</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 1177.

<sup>737</sup> In his opinion in *Bosman*, A.G. Lenz considered that transfer rules in football were disproportionate to the objective of ensuring the competitive balance between clubs, and that training compensations were more likely to achieve those aims. See Case C-415/93, *Union des Associations Européennes de Football (UEFA) and others v Jean-Marc Bosman*, [1995] ECR I-04921, Opinion of AG Lenz, para. 239.

<sup>738</sup> See *Bosman*, para. 106. However, the Court held in that instance that the specific form taken by the transfer system was neither capable of encouraging the recruitment and training of young players, nor it constituted an adequate means to finance such activities. See *ibid*, para. 109.

<sup>739</sup> See Articles 6(1) and 6(2) of the FIFA Regulations on the Status and Transfer of Players. In basketball, instead there is a transfer deadline, after which players cannot be registered by teams. See KEA/CDES, 'Study on the Economic and Legal Aspects of Transfers of Players' (European Commission, 2013), p. 67.

transfer windows compulsory starting from the 2002/2003 season.<sup>740</sup> Furthermore, the same regulations establish that a player may be registered with a maximum of three clubs during one season, but play official matches only for two of these clubs.<sup>741</sup> Finally, for knock-out European competitions there are even more stringent rules: indeed, a player cannot be fielded to take part in the competition for more than one club in the course of the same season.<sup>742</sup>

The main aim of transfer windows, or registration periods, is to avoid disruptions of the championship.<sup>743</sup> In their absence, a club could sign the best players on the market the day before the final match of the competition and significantly increase its chances of winning. Hence, transfer windows pursue the aim of protecting seasonal stability and competitive balance, but also the integrity of the competition and its perception by fans. Furthermore, it may be argued that this kind of rule protects the interests of all the stakeholders in sport, including fans, broadcasters, teams and Governing Bodies.<sup>744</sup>

On the other hand, it may be argued that transfer windows run against the goal of competitive balance. Indeed, the time restriction imposed on the activity of clubs constricts the market and inflates the prices, thereby favouring clubs that can afford to spend high sums in a short span.<sup>745</sup> Moreover, small sides have in their players their main assets, and limiting their ability to sell them may have a significant impact on their finances. This may be considered yet another inherent characteristic of sport, as in any other business a cash-flow problem could be easily resolved by selling some of the assets.

Applying a *Meca-Medina* approach, the restrictions caused by a registration period may be seen as inherent to the organisation of the competition itself and to the pursuit of

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<sup>740</sup> This was part of the 2001 Agreement between FIFA and the European Commission on the transfer system. See Garcia, B., (2011), *The 2001 informal agreement on the international transfer system*. European Sports Law and Policy Bulletin, I-2011, pp. 17-29.

<sup>741</sup> See Article 5(3) FIFA Regulations on the Status and Transfer of Players.

<sup>742</sup> See Art 42.07 of the Regulations of the UEFA Champions League 2015/16.

<sup>743</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 1173.

<sup>744</sup> See Berry, A. (2012), *Challenging Football Transfer Windows: A disproportionate response to a legitimate aim*, Sport & Law Journal, 20, 1.

<sup>745</sup> See Pearson, G. (2015). *Sporting justifications under EU free movement and competition law: The case of the football 'Transfer system'*. European Law Journal, 21(2), 220-238.

those objectives. It thus appears that these objectives can be deemed legitimate, and hence the question to be addressed is related to the proportionality of the restrictions that they cause. In this sense, it may be argued that the distortion caused and the restriction imposed are not proportionate to the objective pursued, and that less restrictive means could meet the same goals.<sup>746</sup> In particular, a less restrictive arrangement would prohibit transfers in the last part of the season. Hence, if the restrictions go beyond what is necessary to achieve the legitimate objective, their legality may be contested. Similarly, the system does not appear to create economic efficiency, which would allow it to meet the main requirement of Article 101(3) TFEU. Nevertheless, the legality of registration periods has been confirmed in few instances by the European authorities. The Commission has maintained that the regulation of transfer periods is likely to constitute a sporting rule that would not infringe competition law.<sup>747</sup> Furthermore, transfer windows have already been assessed in *Lehtonen*, although only under the provisions on free movement. It has to be reminded, in any event, that the Court in that case adopted an approach, which now may seem outdated, that was distinguishing between the economic and non-economic nature of the rule in object.<sup>748</sup>

## 4.2 Contract Stability

The main provisions aiming at guaranteeing the stability of contracts in football can be found in Articles 13–18 of the FIFA Regulations on Status and Transfer of Players. In

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<sup>746</sup> See Berry, A. (2012), *Challenging Football Transfer Windows: A disproportionate response to a legitimate aim*, Sport & Law Journal, 20, 1.

<sup>747</sup> See Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, at p.72 and See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 1515. However, in its Communication on Developing European Dimension in Sport, the Commission has also pointed out that the transfer of players may raise concerns about the legality of the system and the transparency of financial flows. See Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Developing the European Dimension in Sport {SEC(2011) 66 final} {SEC(2011) 67 final} {SEC(2011) 68 final}, at para 4.4.

<sup>748</sup> This approach was later frowned upon (although the phrase is a little informal) by the Court of Justice in *Meca Medina*, where such a distinction was disregarded. See Case C-519/04 P, *David Meca-Medina and Igor Majcen v Commission of the European Communities*. [2006] ECR I-6991, para. 27, and Anderson, J., (2013), *Leading cases in sports law*, Asser Press, The Hague. p. 141.

particular, Article 17 establishes that players themselves may have to pay compensation<sup>749</sup> in the event of a termination of the contract without just cause, on the basis of their market value.<sup>750</sup> Moreover, the Regulations introduce a so-called protected period. This corresponds to the first three years from the entry into force of the contract between a player and a club, or two years if the player is older than 28, during which sporting sanctions will be imposed on the athlete in the event of a unilateral breach of contract on his side.<sup>751</sup> This protected period starts again every time the contract is renewed, and its duration extended. Once this period has expired, the player will be able to terminate the contract with no sanctions, provided that compensation is paid to his current club.<sup>752</sup>

The introduction of Article 17 allowed the system to respond to the liberalisation that occurred with *Bosman*: while players can move freely at the end of their contract, clubs tend now to extend contracts more regularly, thereby renewing the protected period as well. The consequence is that clubs will retain a high level of control over players.<sup>753</sup> It is apparent how these rules can still cause a restriction on the market. The Regulations have been subject to amendments since 2001, but the substance has remained untouched. The elements that characterised the transfer system in the pre-*Bosman* era are still present.<sup>754</sup> As opposed to the transfer fees due for players after the expiry of

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<sup>749</sup> The amount of compensation for the unilateral breach of contract has been subject of a number of CAS awards. In *Webster*, the Court held that the damages to be paid should have been calculated on the basis of the outstanding remuneration due until the expiry of the contract. See CAS 2007/A/1298/1299/1300. In *Matuzalem*, instead, the Court stated that the payment had to be based on the costs of replacing the player who has left the club, and hence his transfer value. See CAS 2008/A/159. Through these developments, however, the system managed to reintroduce transfer fees in cases of unilateral breach of contract. See Pearson, G. (2015). *Sporting justifications under EU free movement and competition law: The case of the football 'Transfer system'*. European Law Journal, 21(2), 220-238.

<sup>750</sup> This can be inferred from the second paragraph of Article 17, FIFA Regulations on the Status and Transfer of Players.

<sup>751</sup> The sanction may range from 4 to 6 months' suspension from playing in official matches.

<sup>752</sup> See Gardiner, S. and Welch, R., (2007), *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'?*, Entertainment and Sports Law Journal.

<sup>753</sup> Another consequence is the leverage power that players may have during the negotiation of the new contract. This partially explains the increase in players' wages from the pre-*Bosman* era. See Parrish, R., (2015), *Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law*, Maastricht Journal of European and Comparative Law, 22(2) 256-282.

<sup>754</sup> I.e. provisions protecting contractual stability and transfer fees. The only exception is the introduction of the new training compensation.

their contract, the system now features compensation payments and protected periods, but the effect is similar.

It should then be assumed that the assessment made by the Court of Justice in *Bosman* is still applicable and correct today,<sup>755</sup> and that the transfer system persists in breach of EU law. This is especially true when Article 165 TFEU is taken into account. The promotion of openness and fairness can hardly be considered compatible with a transfer system that restricts the ability of players to move and of clubs to sign them. An effective solution would be to engage FIFPro in the discussion, and make better use of the possibilities offered by the Social Dialogue instrument, in order to come to a satisfying arrangement for all the parties involved.

A lack of effective involvement of FIFPro may indeed be considered as one of the reasons that triggered the complaint lodged by the players' union with the European Commission.<sup>756</sup> It must be noticed that one of the aims of the complaint is to develop a better governance policy that may achieve the objectives of solidarity amongst clubs and training of young athletes. It therefore recognises some of the goals pursued by the system itself, while criticising the methods. The complaint deals with a number of aspects related to the international transfer system, including the training compensation scheme, and the provisions on contract stability.<sup>757</sup> In particular, the introduction of a protected period after the renewal of the contract goes beyond the restriction that is necessary to achieve the objectives of the rules.<sup>758</sup> The complainant submitted that the transfer system reduces the ability of clubs to compete for players, and constitutes a disincentive to recruitment. Furthermore, players are affected as well, as it reduces their opportunities to find employment and it conditions the terms under which the

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<sup>755</sup> See Egger, A. and Stix-Hackl, C. (2002), *Sports and Competition Law: A Never-Ending Story?*, European Competition Law Review, 23/2, p. 89.

<sup>756</sup> See the press release at <https://www.fifpro.org/en/news/fifpro-takes-legal-action-against-fifa-transfer-system>.

<sup>757</sup> See Parrish, R. (2015), *Article 17 of the FIFA Regulations on the Status and Transfer of Players: Compatibility with EU Law*, Maastricht Journal of European and Comparative Law, 22(2) 256-282.

<sup>758</sup> See Duval, A., (2015) *Interview with Wil van Megen (Legal Director of FIFPro) on FIFPro's EU Competition Law complaint against the FIFA Transfer System*, Asser International Sports Law Blog, 29 September 2015, available at [http://www.asser.nl/SportsLaw/Blog/post/interview-with-wil-van-megen-legal-director-of-fifpro-on-fifpro-s-eu-competition-law-complaint-against-the-fifa-transfer-system#\\_ftn1](http://www.asser.nl/SportsLaw/Blog/post/interview-with-wil-van-megen-legal-director-of-fifpro-on-fifpro-s-eu-competition-law-complaint-against-the-fifa-transfer-system#_ftn1) [last accessed 9 February 2016].

employment is offered. It is finally argued that the Commission has failed to evaluate the impact of the transfer system, after the informal agreement struck in 2001.<sup>759</sup>

While the sporting movement has often fought for the recognition of a right to self-regulation, it is the very self-regulation of labour relationships that has distorted the market, through the imposition of constraints on the freedom of athletes and the inflation of transfer fees.<sup>760</sup> In this context, the complaint is particularly significant as it comes from one of the main stakeholders in sport, the athletes. FIFPro has been involved in the discussions to give input to the decision-making and the regulatory process of the system, and, to some extent, also in the setting up of the current transfer system itself.<sup>761</sup> It is, therefore, unlikely that the complaint will result in anything more than a bargaining tool, which FIFPro will use to discuss the issues around the transfer system.

However, the importance of this action should not be underestimated, as it may represent a statement against the notion of a pure autonomy granted to sporting bodies that comes from within the system. In turn, this is a call for a co-regulatory approach, whereby the power of the Governing Bodies is constrained and somewhat channeled by the authorities. FIFPro's complaint may also be interpreted as a request to limit the recourse to the notion of specificity of sport, under which the labour market mobility of athletes has been controlled and reduced.<sup>762</sup>

## 5. Third Party Ownership

One of the main consequences of the liberalisation of the sports players' market after *Bosman* has been the enormous increase in transfer fees and players' wages paid by

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<sup>759</sup> See FIFPro, executive summary of the complaint, available at <https://www.fifpro.org/attachments/article/6156/FIFPro%20Complaint%20Executive%20Summary.pdf> [last accessed 06/06/2016].

<sup>760</sup> See Gardiner, S. and Welch, R., (2007), *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules 'The Beautiful Game'?*, Entertainment and Sports Law Journal.

<sup>761</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>762</sup> See De Marco, N. and Mills, A. (2016), *FIFPro challenge the football transfer system*, Sports Law Bulletin, 9 February 2016, available at <http://sportslawbulletin.org/2016/02/09/fifpro-challenge-the-football-transfer-system/> [last accessed 15 March 2016].

clubs.<sup>763</sup> The financial crisis that has spread over Europe in the last decade has hit the sport system hard, and clubs had to come up with alternative ways to face the costs of the market.

This is the framework and the background from which third party ownership<sup>764</sup> of players began to take place. This expression defines a situation whereby a third party provides a club with money in exchange for a percentage of the future transfer fee of a specific player.<sup>765</sup> Hence, the club that has registered the player will receive a sum and promise that, in the event of a future transfer of the player, the third party will receive a percentage of the payment received.<sup>766</sup> No third parties ‘own’ a player, but only a share of the economic rights attached to him,<sup>767</sup> and only insofar as the contract between the player and the club is valid. Individual investors, investment funds and private companies can all be third parties in this scenario. This system allows smaller clubs, or clubs with a difficult economic situation, to finance their activities on the market by having access to short term liquidity. They are therefore able to sign players that they could not afford otherwise, as the third party share the risks of the investment and the financial burden.<sup>768</sup>

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<sup>763</sup> See European Commission, Press Release IP 13-95, Commission blows the whistle over inflated football transfer fees and lack of level playing field, Brussels, 7 February 2013.

<sup>764</sup> TPO hereinafter.

<sup>765</sup> See KPMG, (2013) Report on Third Party Ownership, p. 5. The Report defines TPO and identifies the main types of TPO agreements in Europe.

<sup>766</sup> In most of the cases, the TPO agreement established that, in the event that the player is not traded the club Duval, A. (2015) *Unpacking Doyen's TPO Deals: FC Twente's Game of Maltese Roulette.*, Asser International Sports Law Blog, 2 December 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-fc-twente-s-game-of-maltese-roulette-by-antoine-duval-and-oskar-van-maren> [last accessed 9 February 2016]. will have to purchase back the share of the economic rights held by the third party plus an agreed-upon interest rate, or the higher price that was offer in a deal rejected by the club. Furthermore, if the agreement has set a minimum return, the club will need to pay that amount to the third party even if the transfer fee received is lower, or if the club breaches its contract. See Lindholm, J. (2016), *Can I please have a slice of Ronaldo? The legality of FIFA's ban on third-party ownership under European Union law*, The International Sports Law Journal, 15, 3, pp. 137 – 148.

<sup>767</sup> See Van Maren, O. et al. (2016) *Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium*, The International Sports Law Journal, Volume 15, Issue 3, pp 233-252.

<sup>768</sup> The case of F.C. Twente, however, demonstrates how a football club in economic difficulties may found itself in even worse conditions after having agreed to a TPO. See Duval, A. (2015) *Unpacking Doyen's TPO Deals: FC Twente's Game of Maltese Roulette.*, Asser International Sports Law Blog, 2 December 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-fc-twente-s-game-of-maltese-roulette-by-antoine-duval-and-oskar-van-maren> [last accessed 9 February 2016].

The system of third-party ownership has been contested in the past by UEFA and FIFPro in relation to a number of questions. On one hand it has been argued that TPO may encroach the freedom of athletes, who may lose control of their own career if subject to pressure from a third party to transfer to another club, as this will be profitable for the third party itself.<sup>769</sup> On the other hand, the continental football association has maintained that in the event that the same third party holds rights on players competing against each other, this may represent a threat to the integrity of the game.<sup>770</sup> Furthermore, third party ownership follows a short-term profit maximisation that is contrary to the goals of financial stability in football and of the development of young players.<sup>771</sup> As the third party investors aim at recouping their investments through transfer fees paid for the players, the system is also likely to impair contractual stability, which was the objective pursued by the Transfer system and accepted by the Commission in 2001.<sup>772</sup>

TPO has been banned by a number of national federations, including the English Premier League.<sup>773</sup> Finally, in 2015 FIFA decided to impose a worldwide ban on TPO in football.<sup>774</sup> The ban is effective only on new agreements: the TPO signed before the Regulations entered into force remain valid. In response to the decision of FIFA, the Spanish and Portuguese Leagues, two of the leagues that were using TPO most frequently, filed a complaint with the Commission arguing that the ban is capable of infringing freedom of movement of labour and capital and the rules of competition

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<sup>769</sup> See Poli, R. (2016) in *Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium*, The International Sports Law Journal, Volume 15, Issue 3, pp. 233-252.

<sup>770</sup> See CDES-CIES (2014) Third-party ownership of players' economic rights, Part II. In practical terms, UEFA relies on the acceptance of a restrictive conduct under the need to preserve the integrity of the game, as it was the case in *ENIC*. See Case COMP/37 806: *ENIC/ UEFA*.

<sup>771</sup> See Poli, R. (2016) in *Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium*, The International Sports Law Journal, Volume 15, Issue 3-4, pp 233-252.

<sup>772</sup> See *infra*, § 3, and Duval, A., (2015) *Unpacking Doyen's TPO Deals: In defence of the compatibility of FIFA's TPO ban with EU law*, Asser International Sports Law Blog, 18 December 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-in-defence-of-the-compatibility-of-fifa-s-tpo-ban-with-eu-law> [last accessed 9 February 2016].

<sup>773</sup> Premier League Rules U39-40. TPO are not allowed in France and Poland either. See KPMG (2013) Report on Third Party Ownership, p. 6.

<sup>774</sup> Article 18 *ter* of the Regulations on the Status and Transfer of Players. FIFA has previously adopted Article 18 *bis*, prohibiting a third party owner from influencing a club's employment or transfer related matters.



law.<sup>775</sup> Indeed, FIFA rules constitute a decision by an Association of undertakings, which is capable of restricting the ability of players to move from one club to another, but also the freedom of investors and their activity on the market.

While a full application of EU law to the issue could lead to establishing an infringement of competition,<sup>776</sup> the objective pursued and the proportionality of the restriction caused have to be carefully assessed.<sup>777</sup> The TPO ban pursues a number of legitimate aims, such as the integrity of competition, the independence of clubs and the financial stability of the system.<sup>778</sup> These regulatory objectives have been accepted by the institutions of the EU, as they are capable of affecting the perception of fans and their willingness to follow the League.<sup>779</sup>

Although they recognise that some form of regulation of the TPO instrument is needed, the complainants have stressed that third-party ownership is a useful and sometimes essential practice for clubs. Indeed, it could be argued that third-party ownership has pro-competitive effects, as it provides financial means to economically weaker clubs, which can then better face the disparity existing in the system and enhance the uncertainty of results. Conversely, the ban may constitute a disproportionate measure.<sup>780</sup> In relation to this, the necessity of the ban has to be considered,<sup>781</sup> where

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<sup>775</sup> See The Spanish and Portuguese Leagues denounce FIFA's TPO ban to the European Commission, at <http://www.laliga.es/en/news/the-spanish-and-portuguese-leagues-denounce-fifas-tpo-ban-to-the-european-commission>.

<sup>776</sup> See Siekmann, R.C.R. (2013), *Social dialogue in professional sports: on some topics about European sports law: emphasis on 'old and new' EU member states*, Shaker Verlag, Aachen.

<sup>777</sup> The ban has been contested by a Belgian football club, supported by Doyen, before a Belgian National Court and subsequently before the Brussels Court of Appeal for a provisory measure, in the attempt to suspend the effects of the ban. In this instance, the Court held that it cannot be assessed with sufficient certainty that the ban would be contrary to Article 101(1) TFEU. See Cour d'appel Bruxelles, Doyen Sports et ASBL RFC Seraing United c. URBSFA, FIFA et UEFA, 2015/KR/54, 10 mars 2016.

<sup>778</sup> By restricting the clubs' sources of finance, the ban aims at preventing them from over-investing on the players' market. This is a similar objective to the one pursued through the Financial Fair Play rules. See *infra*.

<sup>779</sup> See Decision in Case COMP/37 806: ENIC/ UEFA, para. 38. See also Weatherill, S. (2012) *EU Sports Law: The Effect of the Lisbon Treaty*. Oxford University Press, and Parrish, R. (2012), *Lex Sportiva and EU Sports Law*, European Law Review, 37, Dec, pp. 716-733.

<sup>780</sup> See La Liga (2016), in *Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium*, The International Sports Law Journal, Volume 15, Issue 3-4, pp 233-252.

<sup>781</sup> The complainants have also argued that the practice of loaning players to other clubs should raise comparable if not higher concerns. This position is also maintained in the Report prepared for the Commission on the transfer of players. KEA-CDES (2013) Study on the economic and legal aspects of transfers of players, December 2013, pp. 193 *et seq.*

FIFA had already adopted a provision prohibiting third parties from exercising influence on club's employment or transfer related matters.<sup>782</sup> FIFA should then demonstrate that Article 18*bis* was not effective in achieving its goals, and that what was needed was a more stringent provision. Furthermore, the ban must be the least restrictive means available to successfully achieve the objective. Hence, it has to be demonstrated that a more transparent form of regulation, which would be less restrictive, would not be capable of achieving the same objectives.<sup>783</sup>

This last aspect is of particular relevance. Indeed, the ban itself may not be too effective in achieving its objectives. The peculiarity of this system is that third party investors are not necessarily bound by FIFA regulations.<sup>784</sup> This means that, while clubs dealing with TPO investors would face sanctions, the investors themselves could still enforce the TPO agreement before a national court.<sup>785</sup>

Two main considerations have to be put forward in relation to the TPO ban. Firstly, a comparison can be drawn between the TPO ban and the *ENIC* case,<sup>786</sup> where the Commission considered only the legality of a rule prohibiting one entity from controlling multiple clubs, but not the acquisition of minority stakes in them. Indeed, UEFA considered that holding a minority stake in a club would not have a severe effect on the fans in terms of their perception of the integrity of the competition. On the other

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<sup>782</sup> See Article 18 bis of the FIFA Regulations on the Status and Transfer of Players.

<sup>783</sup> See in this sense the recommendations made in the Report for the Commission. KEA-CDES (2013) Study on the economic and legal aspects of transfers of players, December 2013, p. 8, and Lindholm, J. (2016), *Can I please have a slice of Ronaldo? The legality of FIFA's ban on third-party ownership under European Union law*, The International Sports Law Journal, 15, 3, pp. 137 – 148. For a discussion of possible alternatives, see La Liga (2016), in *Debating FIFA's TPO ban: ASSER International Sports Law Blog symposium*, The International Sports Law Journal, Volume 15, Issue 3-4, pp 233-252. Finally, Duval argues that less restrictive means would not be as effective as a ban. See Duval, A., (2015) *Unpacking Doyen's TPO Deals: In defence of the compatibility of FIFA's TPO ban with EU law*, Asser International Sports Law Blog, 18 December 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-in-defence-of-the-compatibility-of-fifa-s-tpo-ban-with-eu-law> [last accessed 9 February 2016].

<sup>784</sup> Unless they themselves are subject to FIFA jurisdiction, as players' agents, clubs, other athletes and so on.

<sup>785</sup> However, the Agreement between the club and the third party may establish that CAS has jurisdiction over disputes related to the contract. This is what has happened in the case between Doyen, a Maltese company that owns rights on a number of players around the world, and Sporting Lisbon. See Duval, A., (2015) *Unpacking Doyen's TPO Deals – Sporting Lisbon's rebellion in the Rojo case*, Asser International Sports Law Blog, 9 December 2015, available at <http://www.asser.nl/SportsLaw/Blog/post/unpacking-doyen-s-tpo-deals-sporting-lisbon-s-rebellion-in-the-rojo-case-by-antoine-duval-and-oskar-van-maren> [last accessed 9 February 2016].

<sup>786</sup> See *supra*, *Integrity and Regulatory rules* chapter, § 2.2.

hand, holding a minority stake in the economic rights of a player is considered a major cause of concern. This is a matter that has to be considered when the rule will be assessed under the proportionality test.

The second point that may be stressed here is the relevance of the objective of the financial stability of the system. This aim underlies a number of Regulations and arrangements that have been adopted by Governing Bodies starting from the year 2000.<sup>787</sup> Although this has been recognised as legitimate by the Commission,<sup>788</sup> this objective is purely economic in nature, and it is hardly justifiable under a purely sporting interest. It is however a regulatory interest that Governing Bodies may try to protect for the viability of the system. On the other hand, the pursuit of financial stability is likely to run against the competitive balance of a league, as it would sanction weaker teams, which would overspend to fill the gap with more powerful clubs. In turn, the competitive balance would be enhanced by a greater degree of solidarity payments between clubs. The limited impact that solidarity compensation has on the system contributes to reinforce the existing hegemony of elite clubs and does not address the issue of competitive balance.<sup>789</sup>

The financial instability of the system represents an inefficiency of the market, which the market itself has created through its transfer system. Rules that restrict the ability of undertakings to compete cannot solve the situation. Competition law should therefore intervene and tackle the inefficiency by preventing these types of restrictions. However, this does not mean that the specificity of sport would be disregarded. Rules that, despite imposing restrictions on the market, are capable of achieving a greater degree of solidarity are also more likely to satisfy the efficiency tests and the inherency test. Indeed, the main reason behind the need to impose rules that guarantee financial

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<sup>787</sup> The ban on third party ownership, Financial Fair Play Rules, the stricter control on State aid and the Transfer system itself aimed, amongst other things, to the stability of the competition and of the financial situation of clubs.

<sup>788</sup> See C(2014) 7378 final, Commission Decision of 14.10.2014 adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA), at para 2.7.

<sup>789</sup> According to the Study on the transfers of players, in 2013 solidarity payments amounted only to 1.84% of the total transfer fees paid in European football. Furthermore, clubs that do not play in the Champions League receive only 6% of the revenues granted to the 32 clubs that participate in the Competition. See KEA-CDES (2013) Study on the economic and legal aspects of transfers of players, December 2013, p. 7.

stability is to be found in the costs of the market for players, and the lack of a sufficient degree of solidarity in the system. Ultimately, the solidarity amongst clubs should be promoted to protect the specific nature of sport and the openness and fairness of the system.<sup>790</sup>

## **6. Mandatory Player Release**

One specific characteristic of sport is the possibility for athletes to represent their own country in international competitions. This is not only a matter of national pride, and a way to boost the sense of belonging and citizenship. It also involves the possibility for the athletes to enhance their media exposure, and hence market value and bargaining power, when it comes to signing a contract.

In team sports, however, clubs tend not to look with favour on the idea of releasing their players - workers that they pay a considerable wage - to play for the national team, with all the risks of possible injuries connected to it. Many sporting bodies, therefore, have decided to impose a mandatory and non-compensated player release clause to their clubs, with pecuniary and sporting sanctions in the event of non-compliance.

Hence, under the FIFA Regulation for the Status and Transfer of Players, it is mandatory for football clubs to release their players for matches of their respective national teams.<sup>791</sup> Under the original rule, the clubs themselves had to provide an appropriate insurance cover for their players during the release period, without being entitled to any form of financial compensation in the event of injuries.

Football clubs did not accept this rule peacefully, as they were losing control of their players without being able to profit from redistribution of the revenues of the Federation, and still had to bear the risks associated with injuries occurred to players while playing for the national team. Furthermore, clubs were not consulted over the setting of the rules and over the match calendar.

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<sup>790</sup> For a discussion on players' agents, see *supra*, *Integrity and Regulatory rules* chapter.

<sup>791</sup> See Article 1, Annex 1, FIFA Regulations on the Status and Transfer of players.

However, the existence of a mandatory release rule may be considered necessary to guarantee national team competitions. Moreover, being released for international duties is a legitimate expectation of the players as this may raise interest in their performance. Indeed, as international competitions constitute the perfect platform to advertise the players' skills and talents to the market, playing for a national team is a lucrative opportunity for the athletes.<sup>792</sup>

The tension between clubs and national teams reached its peak in 2004, when the G-14<sup>793</sup> lodged a complaint with the Commission and the Swiss Competition Authority arguing that FIFA rules on players' release were in breach of Article 101 and 102 TFEU. In 2006, the Belgian football club Charleroi challenged the rule before the national court, after having had to bear the loss of its Moroccan player Oulmers for an injury sustained during an international friendly match played with his national team. The main issue related to the obligation resting on clubs to provide medical insurance for their players even during the period they were spending with the national team, with no possibility of obtaining financial compensation for the damages possibly sustained.<sup>794</sup> The clubs also argued that the injury of the player impaired their chances to succeed in the national championship.

The National Court made a preliminary reference to the CJEU, asking to decide on the compatibility with Article 101 and 102 TFEU of the mandatory release clause, combined with the authority of Governing Bodies to set the international calendar. FIFA finally reached an agreement with the G-14, which joined the existing action brought by Charleroi, according to which UEFA committed to distribute every four years a sum to national associations to be passed on to their clubs which have

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<sup>792</sup> In this regard, the Court of Justice has long recognised that even individual athletes may be considered to carry out their economic activities when involved in international competitions, even when some of the services they perform are not paid. See Case C-51/96, *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo*, [2000], ECR I-02549, at para. 56.

<sup>793</sup> The G-14 was the group of the 14 leading football clubs in Europe. After the negotiated agreement with FIFA on the mandatory release clause, G-14 has been disbanded and replaced by ECA, which formally represents all the clubs in Europe. See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 1159.

<sup>794</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

contributed to the staging of the European Championship.<sup>795</sup> In turn, the complaint was withdrawn and G-14 was disbanded.

Therefore, the Court of Justice did not have the chance to pronounce itself on the matter. In any event, it could be argued that the mandatory player release rule could produce some efficiencies likely to grant it an exemption from EU competition law. Indeed, the complaint of G-14 was merely based on protecting their own economic activity and their wealth, to the possible expense of smaller clubs, and to the detriment of the public interest. As the mandatory release could be argued to enhance consumers' welfare by promoting high-quality international competitions for the benefit of fans, it would have been difficult to sustain the legality of a prohibition of this scheme under Article 101 TFEU. Furthermore, the existence of a release rule may be considered indispensable for the system in light of its effect on competitive balance and overall solidarity between clubs.<sup>796</sup>

While the release in itself is acceptable, the system of compensation is actually likely to increase the competitive imbalance of a league, as it provides payments for teams which have given their players to national selections. These athletes tend to play for the best teams in the league, which, on top of their normal revenues, also receive a compensation for the release, thereby possibly increasing the gap with smaller teams. This outcome would, in fact, run against the solidarity principle that has been upheld by the European institutions in more than one instance.<sup>797</sup>

The process that led to the adoption of the mandatory players' release rule forms part of a decentralisation process, where much decision-making power has been left to a small number of elite European teams. This presents a question of legitimacy in relation to the lack of representation of all stakeholders that suffer the impact of these types of

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<sup>795</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 1160.

<sup>796</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>797</sup> See amongst the others the Council Nice Declaration on Sport and the Commission White Paper on Sport, at paras. 4.1 and 4.8.

decisions.<sup>798</sup> An efficient form of co-regulation cannot exclude or forget relevant stakeholders from the discussion and from the decision-making process. The involvement of the various stakeholders would enhance the legitimacy of the rules and strengthen the governance of the system. On the other hand, the mandatory player release rule is the best example of an employment-related aspect that could be subject of discussion under the Social Dialogue umbrella.

## 7. Home Grown Players Rules

As previously mentioned, the Court of Justice assessed the legality of restrictions on the movement of athletes in *Bosman*. The main question to be answered in that case concerned the proportionality of the restrictions imposed by the transfer system in relation to the ability of rich clubs to recruit the best players and undermine the competitive balance in the league.<sup>799</sup> However, the perceived consequences arising from the judgment,<sup>800</sup> and in particular the possible effects on the economic situation of the system, convinced UEFA to introduce a number of regulatory measures, including the ‘home grown players rule’.<sup>801</sup> According to this regulation, clubs participating in UEFA competitions need to have in their squad a minimum number of locally trained players. In particular, clubs are required to field a squad comprising club-trained players and association-trained players. This definition comprises players, irrespective of their nationality and age, who have been trained by the club or by another club in the

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<sup>798</sup> See Pijetlovic, K. (2015), *EU Sports Law and Breakaway Leagues in Football*, ASSER International Sports Law Series, T.M.C. Asser Press, The Hague.

<sup>799</sup> See Case C-415/93 *Union Royale Belges des Societes de Football Association and others v Bosman and others*, [1995] ECR I-4921, at para 135 and KEA/CDES, ‘Study on the Economic and Legal Aspects of Transfers of Players’ (European Commission, 2013), at p. 3.

<sup>800</sup> See Miettinen, S. and Parrish, R., (2007), *Nationality Discrimination in Community Law: An Assessment of UEFA Regulations Governing Player Eligibility for European Club Competitions (The Home-Grown Player Rule)*, Entertainment and Sports Law Journal, 5, 13. Perceived consequences included aggregation of top talents in elite clubs, aggregation of talents in elite leagues and consequent competitive imbalance, and a decrease in indigenous talents in elite leagues. See also Gardiner S. and Welch, R. (2016) ‘Nationality based quotas and International Transfers’, in Duval, A. and Van Rompuy, B. (eds.) *The Legacy of Bosman, Revisiting the Relationship between EU law and Sport*, T.M.C. Asser Press, p. 64.

<sup>801</sup> The rule is now located in Article 43 of the Regulations of the UEFA Champions League, Season 2015/2016, and in Article 42 of the Regulations of the UEFA Europa League, Season 2015/2016.

same national association for at least 3 years between the age of 15 and 21. In its final formulation, the rule requires clubs to have at least 8 locally trained players out of a squad of 25. If a club does not include in the list the minimum number of locally trained players, the list of players on the squad is reduced accordingly.<sup>802</sup>

The 'home-grown players' rule aims at enhancing the development and training of young players.<sup>803</sup> It is argued that this would also increase the balance of the competition, as it would restrict the ability of richer clubs to fill their squad with expensive players developed and trained elsewhere.<sup>804</sup> On the other hand, the rule is likely to restrict the ability of clubs to recruit players, and, in turn, the ability of players to find employment in the European market. Furthermore, it poses conditions for the participation in European Competitions, thereby regulating the access to a series of sporting events, which consequently affects the level of economic competition on the exploitation market.<sup>805</sup>

The rule does not mention the nationality of locally trained players, thereby avoiding a direct discrimination. However, it can be considered indirectly discriminatory, as the condition of being locally trained is more likely to be satisfied by a national of the Member State where the club itself is established. This form of indirect discrimination is not only relevant under the free movement provisions, but it may also affect the supply market. Indeed, the rule obliges clubs to recruit a share of their players from their own national market, restricting the pool of talents from which to choose and thereby foreclosing the inter-states competition in that relation.<sup>806</sup>

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<sup>802</sup> See Article 43.06 of the Regulations of the UEFA Champions League, Season 2015/2016.

<sup>803</sup> See Geeraert, A. (2013). *The role of the EU in better governance in International sports organisations*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 25-37.

<sup>804</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011.

<sup>805</sup> See Manville, A. (2009), *The UEFA, the Home Grown Player Rule, and the Meca-Medina Judgment of the European Court of Justice*, *International Sports Law Journal*, 1-2, pp. 25 – 34.

<sup>806</sup> See Manville, A. (2009), *The UEFA, the Home Grown Player Rule, and the Meca-Medina Judgment of the European Court of Justice*, *International Sports Law Journal*, 1-2, p. 27. The foreclosure of the market, and the partitioning of the market alongside national border are prohibited under EU competition law even in relation to the sporting industry. See in relation to this Cases C-403/08 and C-429/08. *Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083, para. 139., para 139.



Nevertheless, the rule has received support from the Commission<sup>807</sup> and the European Parliament.<sup>808</sup> In particular, the development of young athletes has a significant value for the institutions of the European Union, and may also be considered to pursue the objectives highlighted by Article 165 TFEU. However, despite the legitimate objectives pursued, it could be argued that the restrictions caused by the rule are not capable of achieving the set goals, and hence, fail the proportionality test. Indeed, the independent study issued by the Commission on the legality of the rule found little evidence of a significant impact on the quality of the training and development of young players, on the related investments and on competitive balance.<sup>809</sup> It appears that the rule was not formulated in a way that was able to guarantee its effectiveness. The objectives were in fact related to the European football system in its entirety, but the rule imposes only conditions for the participation in European competitions. It therefore means that it does not apply to all those clubs that have not secured a place in those events.<sup>810</sup> Furthermore, the competitive balance argument is not fully convincing, as the rule itself does not prevent richer clubs from recruiting the best players, while the poorer ones have to select their players from a range that is restricted by the requirement of the regulations.<sup>811</sup>

A thorough assessment of the rule and its effects would also find it not inherent in the organisation of the competition<sup>812</sup> and disproportionate with respect to the legitimate

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<sup>807</sup> See European Commission, Press Release IP/08/807, UEFA rule on 'home-grown players': compatibility with the principle of free movement of persons, Brussels, 28 May 2008.

<sup>808</sup> See European Parliament, Resolution of 8 May 2008 on the White Paper on Sport, 2007/2261(INI), and the European Parliament resolution of 2 February 2012 on the European dimension in sport 2011/2087(INI), at para. 72.

<sup>809</sup> The results of the Report have been summarised by the authors in an article. See Parrish, R, et al (2014), *An Assessment of the Compatibility of UEFA's Home Grown Player Rule with Article 45 TFEU*, European Law Review, 2014, 39(4), pp. 493-510.

<sup>810</sup> See Manville, A. (2009), *The UEFA, the Home Grown Player Rule, and the Meca-Medina Judgment of the European Court of Justice*, International Sports Law Journal, 1-2, p. 30. This will be the case, unless the national association has implemented a similar rule in relation to the domestic competition.

<sup>811</sup> See Weatherill, S. (2011), *EU Sports Law: The Effect of the Lisbon Treaty*, Oxford Legal Studies Research Paper No. 3/2011. However, the Study on the Assessment of UEFA's 'Home Grown Player Rule' indicated that the rule had some marginal positive effect on competitive balance, by forcing amendments on the recruiting strategies of the larger clubs. See Study on the Assessment of UEFA's 'Home Grown Player Rule' (2013) p. 100.

<sup>812</sup> See Parrish, R, et al (2014), *An Assessment of the Compatibility of UEFA's Home Grown Player Rule with Article 45 TFEU*, European Law Review, 2014, 39(4), p. 500.

objectives pursued. The assessment would therefore need to be carried out under Article 101(3) TFEU. The Study on the ‘home-grown players’ rule found it capable of producing a marginal positive effect in terms of competitive balance, but it did not definitely establish that the efficiency created were outweighing the restrictive effects. Despite the findings of the Study, a reasoned opinion<sup>813</sup> of the Commission has maintained that the UEFA ‘home-grown players’ rule was an example of proportionate restriction imposed in the pursuit of a legitimate objective.<sup>814</sup>

Clearly, this is another area where the European institutions should seek to influence the discussion and push the relationship dynamic between Governing Bodies and stakeholders towards a more inclusive approach. Social Dialogue would again suit the discussion in this area by involving the main stakeholders that are interested in the debate, namely clubs and players.

## **8. Salary Caps – Financial Fair Play Rules**

One last question that can be discussed in relation to the sports labour market is the adoption of rules that regulate the salary of players, such as salary caps. This measure limits how much money teams can spend on players’ wages,<sup>815</sup> by setting a maximum amount that is the same for all the clubs taking part in the competition.

The introduction of a salary cap may be one of the most effective means to pursue the objective of competitive balance, as it punishes those who exceed in spending and promotes conduct that complies with the rules.<sup>816</sup> Where all the competitors have to operate within the same spending limit, they all have similar chances of triumphing. A

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<sup>813</sup> A reasoned opinion is one of the preliminary stages of an infringement procedure. However, reasoned opinion cannot be challenged, as it does not produce legal effects.

<sup>814</sup> See European Commission, Mapping and Analysis of the Specificity of Sport, June 2016, p. 18 and Commission reasoned opinion, 16 April 2014, Basketball: Commission asks Spain to end indirect discrimination towards players from other Member States.

<sup>815</sup> See Commission of the European Communities. Commission White Paper on Sport, at note 210, COM (2007) 391 final.

<sup>816</sup> This is in particular the case of luxury taxes, which are common in the North American Sports System. Luxury taxes is a financial levy imposed to teams that spend beyond a set threshold. The proceeds of the tax are normally redistributed to the virtuous teams. See KEA/CDES, *Study on the Economic and Legal Aspects of Transfers of Players*, (European Commission, 2013), at pp. 238

salary cap is however likely to restrict the ability of clubs to sign players on the market, as they will be limited in the amount they can spend. This type of regulation is also likely to affect players' ability to get signed and find employment opportunities, thereby conditioning the market for players' services in its entirety. As such, salary caps are likely to cause restrictions on the market and hence fall under the prohibition set by Article 101(1) TFEU. Indeed, these types of measure may be construed as decisions by an association of undertakings, fixing the trading conditions and controlling the investments on the market.

Salary Caps are very common in the North American sports system. They are normally agreed by players as part of the collective labour agreement signed by the Leagues and the players' unions. In that context, if an arrangement is the result of a collective bargaining process and it affects only the parties involved, it will escape the application of competition law.<sup>817</sup> The same could occur within the European Union, where through collective agreements and the use of Social Dialogue, employers could seek the approval of the players and eliminate the antitrust concerns raised by the regulation.<sup>818</sup>

Salary caps may be hard when the spending limit is fixed and the amount is the same for all the clubs, or soft. In the latter case, the limit is flexible as it depends on the revenues of each club and it is calculated as a percentage of that sum.<sup>819</sup> In some instances, salary caps take the form of a luxury tax, whereby clubs that exceed the spending limit will have to pay a sum corresponding to their excess spending to the league, which will then share the fund amongst virtuous teams.<sup>820</sup>

There are few examples of Salary Caps in Europe,<sup>821</sup> the main one being that implemented by the Rugby League.<sup>822</sup> In relation to football, UEFA has decided to put

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<sup>817</sup> See the U.S. Case *Mackey v. NFL*, 543 F.2d 606, 614–15 (8th Cir. 1976).

<sup>818</sup> See Case C-67/79, *Albany International v Stichting* [1999] ECR I-5751.

<sup>819</sup> See Wise A. and Meyer, B. (1997) *International Sports Law and Business*, Volume 3, Kluwer Law International, p.112.

<sup>820</sup> See Andreff, W., and Szymansky, S. (2006), *Handbook on the Economics of Sport*, Edward Elgar Publishing, p. 652.

<sup>821</sup> See Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex, p. 1182 citing the example of Rugby League, Rugby Union, Basketball and Ice Hockey.

in place a system which presents some similarities with a salary cap, as well as some relevant differences. In 2010, the Governing Body, with the agreement of ECA, adopted the Financial Fair Play rules,<sup>823</sup> as part of the Clubs Licensing Regulations. The rules aim at increasing the financial responsibility of European football clubs with the objective of making the European football system stable and self-sufficient.

The rule sanctions those clubs that cannot reach a financial break-even between expenses paid and revenues collected.<sup>824</sup> A club will be punished if, within a three-year period, its expenses will exceed the relevant incomes by more than €5 million. Therefore, a club that wanted to obtain a licence for the 2016/2017 season had to break even on the aggregate accounts of the three previous seasons.<sup>825</sup>

The system provided for some exceptions, and some leniency during the first three years of its adoption. Clubs were allowed to exceed the boundaries within certain limits,<sup>826</sup> and even fall outside the acceptable deviation, if they were able to report a positive trend in their annual results. They would have avoided the sanctions as they were showing the intention of reaching the break-even threshold in the near future.<sup>827</sup> Other provisions regulate the relevant income that could be taken into account in the assessment. Indeed, there was the risk that owners and shareholders would have tried to circumvent the regulations and keep financing their clubs by overpaying sponsorships or by injecting capitals. Hence, transactions with related parties are subject to a strict control: terms and conditions have to be equivalent to those prevailing in normal arm's

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<sup>822</sup> See Howarth, A. and Robinson, T.A. (2008), *The impact of the Salary Cap in the European Rugby Super League*, International Journal of Business and Management, 3(6): 3-7.

<sup>823</sup> UEFA Club Licensing and Financial Fair Play Regulations, FFP hereinafter. The last edition published at the moment of writing is accessible at [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOWNLOAD.pdf) [last accessed on 4 April 2016].

<sup>824</sup> A similar system exists at national level for the English Premier League and the Football League. This system aims at guaranteeing the payments of transfer fees between clubs and ensure financial and accounting transparency.

<sup>825</sup> Article 57 of UEFA Club Licensing and Financial Fair Play Regulations. The acceptable deviation may be exceeding up to EUR 30 million, if the excess is entirely covered through equity injections from shareholders or related parties. See Article 61 of UEFA Club Licensing and Financial Fair Play Regulations.

<sup>826</sup> In the season 2013/2014 and 2014/2015 the acceptable losses were below €45 Million (phase 1), while in the following three season the limit was reduced to €30 Million (phase 2).

<sup>827</sup> For an overview of the regulations, see Bastianon, S. (2015), *The Striani Challenge to UEFA Financial Fair-Play. A New Era after Bosman or Just a Washout?*, Competition Law Review, vol. 11/1, pp. 7-39.

length transactions and they will be adjusted accordingly if they exceed the fair value standard.<sup>828</sup> Conversely, clubs are allowed to use as part of their relevant incomes the revenues derived from non-football activities,<sup>829</sup> provided that they have some connection with the activities of the clubs, their location or brand. This is consistent with one of the objectives of the rule, which is to encourage investments on facilities and activities profitable for the long term benefit of the clubs.<sup>830</sup>

The Financial Fair Play Regulations form part of the UEFA licensing scheme, which clubs must hold in order to compete at European level. UEFA can impose a number of different penalties on those clubs that do not respect the rules, and even refuse them the licence to take part in European Competitions.<sup>831</sup> Clubs that are found to have breached the regulations can decide to settle the question with the Association through confidential agreements.<sup>832</sup>

In the same way as salary caps, the main objective and consequence of the FFP rules is the reduction of expenses incurred by the clubs in players' wages. While these regulations prevent clubs from spending at a level that is not sustainable, they also constrain their ability to sign players on the market, as well as affect the ability of players to earn and sign a contract. The Rules of FFP are therefore capable of infringing Article 101 TFEU and should be assessed in relation to their objectives and effects.

UEFA has argued that the rules aim at ensuring the integrity and the continuity of international competitions for the entire season, thereby pursuing the long-term financial viability of European football.<sup>833</sup> As it has been seen, these objectives have

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<sup>828</sup> See UEFA Club Licensing and Financial Fair Play Regulations, Annex VI.

<sup>829</sup> Such as income derived from hospitality activities.

<sup>830</sup> *Ibid*, Annex X, C.

<sup>831</sup> Such as economic sanctions, squad reduction, or ineligibility to participate in European competitions.

<sup>832</sup> Manchester City, Paris Saint German and Inter Milan were amongst the clubs sanctioned by UEFA. When settlement is not possible the matter will be referred to an Adjudicatory body, whose decision can be appealed before the Court of Arbitration for Sport. One of the few example occurred in April 2015, when the situation of Dynamo Moscow FC was referred to the Adjudicatory Body which issued a Decision in June 2015.

<sup>833</sup> Furthermore, the rules aim also at protecting clubs' creditors and ensuring that clubs settle their liability with players, tax authorities and other clubs. See Article 2(2) C of the UEFA Clubs Licensing and Fair Play Regulations.

already been recognised as legitimate by the European institutions.<sup>834</sup> However, while the rules do not aim at enhancing the competitive balance of the league, they are in fact likely to reduce it. Indeed, they make it more difficult for less successful clubs to compete with teams that are traditionally strong on and off the pitch, and that can count on a wider and solid fan base. Indeed, the former will have less revenues at their disposal and would tend to be dependent on overinvesting to improve the performance on the field, and consequently on their financial books. Rather than promote fairness and competitive balance, FFP is likely to strengthen and crystallise the existing hegemony of European top-flight clubs.<sup>835</sup> However, the fact that the regulations have been adopted with the agreement of ECA is likely to prevent any successful complaint from the clubs themselves.<sup>836</sup>

In any event, while the objective might be legitimate under EU law, the proportionality of the rules poses concerns. To pass the proportionality test, the rules must be necessary to achieve their goals and limited to the least restrictive means available to reach them. In this context, it should thus be demonstrated that the survival of one team is necessary and directly linked with the existence of all the other competitors and to the competition itself.<sup>837</sup> For these reasons, a number of entities have lodged a complaint with the EU Commission against the FFP rules. The Commission first decided not to examine the complaint as this matter was also the subject of a case before the national Court in Brussels which would have been fully capable of assessing the legality of the rules under EU competition law.<sup>838</sup> In the meantime, the Commission has accepted that

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<sup>834</sup> See *ENIC* in relation to the integrity of the competition, and more specifically in relation to the perception of fans. See *Bosman*, at paras 105-106 in relation to the need to maintain the financial viability of clubs.

<sup>835</sup> See Flanagan, C. (2013), '*A Tricky European Fixture: an Assessment of UEFA's Financial Fair Play Regulations and Their Compatibility with EU Law*', *The International Sports Law Journal*, p. 148.

<sup>836</sup> See Geey, D. (2011) '*The UEFA Financial Fair Play Rules: A Difficult Balancing Act*', *Entertainment and Sports Law Journal*, p. 50.

<sup>837</sup> See Lindholm, J., (2010), '*The Problem With salary Caps Under European Union Law: The Case Against Financial Fair Play*', *Texas Review Entertainment & Sports Law*, p. 189.

<sup>838</sup> The Court held that, if necessary, the Belgian National Court would have referred the matter to the Court of Justice instead. See Case AT.40105, *UEFA Financial Fair Play Rules*, Commission Decision rejecting the complaint, SG-Greffe (2014 15691 C(2014) 8028 final. However, it has to be reminded that the Commission is still best placed to assess an arrangement that has effect on more than one Member State. See Joint Statement on the Functioning of the Network of Competition Authorities, para. 19. In particular, only the Commission may adopt a decision finding that there is no infringement of Articles 101 and 102 TFEU. See

it is in the interest of sports teams, clubs and athletes to protect the economic viability of other teams, athletes and clubs as competitors, thereby implicitly justifying the FFP system.<sup>839</sup> Subsequently, the institution has also expressly stated that the objective of financial stability can be legitimately pursued through measures such as the FFP rules, which are considered to contribute to the sustainable development and healthy growth of sport in Europe.<sup>840</sup> It has to be clear that the adoption of such a Decision does not bind the Court of Justice in a possible assessment of the FFP rules, and it does not prevent legal challenges from any stakeholder.<sup>841</sup> However, it is extremely unlikely that the Commission will take any action, as by doing so it would infringe the legitimate expectation that UEFA has developed in this regard.<sup>842</sup>

The position held by the Commission, and in some relation confirmed by the Court of Justice, may be interpreted as a refusal to assess the legitimacy of a system, which the Commission itself has supported in a number of instances.<sup>843</sup> Similar to the rules regulating the ownership of clubs, the FFP regulations are economic in nature, but they pursue a different objective. Indeed, while in ENIC the rules were deemed to protect the integrity of the system and the perception of fans, FFP aims at guaranteeing the financial stability of clubs. Hence, the objective itself is particularly connected with an economic regulation. Therefore, the question should be focused on the level of efficiency created by the regulations in light of the necessity of the restrictions and its proportionality. These regulations do not appear to be capable of creating efficiency to

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Rizzuto, F. (2011) *Article 5 of Regulation 1/2003: the limits to national procedural autonomy*, in European Competition Law Review, 32 (11). pp. 564-572.

<sup>839</sup> See Joint Statement by Joaquín Almunia, Vice President, European Commission, and Michael Platini, President, UEFA (Mar. 21, 2012), available at [http://ec.europa.eu/competition/sectors/sports/joint\\_statement\\_en.pdf](http://ec.europa.eu/competition/sectors/sports/joint_statement_en.pdf).

<sup>840</sup> See C(2014) 7378 final, Commission Decision of 14.10.2014 adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA), at para 2.7.

<sup>841</sup> Except where such a power has been specifically conferred to it, the Commission cannot give guarantees concerning the compatibility of specific practices with the Treaty. See Case 415/93, *Bosman*, at para 136.

<sup>842</sup> Although the Agreement mentions that the recognition of the compatibility of FFP is subject to compliance with competition law, the Commission has in practice tied its hand, and will not initiate a procedure against the rules. See Duval, A. (2014) *The new 'Arrangement' between the European Commission and UEFA: A political capitulation of the EU*, Asser International Sports Law Blog, 15 October 2014, available at <http://www.asser.nl/SportsLaw/Blog/post/the-new-arrangement-between-the-european-commission-and-uefa-a-political-capitulation-of-the-eu> [last accessed 9 February 2016].

<sup>843</sup> See Bastianon, S. (2015) *'The Striani Challenge to UEFA Financial Fair-Play. A New Era after Bosman or Just a Washout?'*, Competition Law Review, vol 11/1, pp. 7-39.

such an extent that could justify the restrictions imposed on the activity of the clubs and players.

However, the political impasse that characterises the situation confirms the ability of UEFA to deal with the Commission.<sup>844</sup> The political strength of UEFA may render the discussion on the legality of the use of its regulatory power to just an academic debate. As mentioned above, the FFP rules have also been challenged before a national court in Brussels as a possible infringement of competition law. Indeed, the Decision of the Commission in this regard did not stop the complaint, as the institution did not express any position on its merit. Hence, the Belgian Court of First instance has accepted the thesis of the complainants,<sup>845</sup> and referred a question to the CJEU for a preliminary ruling on the compatibility of the FFP break-even rule with competition law, freedom of movement of capital, freedom to invest and freedom of movement of workers and services.

The Court of Justice has however rejected the question as manifestly inadmissible, as it considered itself incompetent to deal with it.<sup>846</sup> Indeed, as UEFA is based in Switzerland, according to the Lugano Convention the CJEU would have been able to pronounce itself on the legality of FFP, and the recovery of possible damages suffered, only where the complainant would have demonstrated a direct interest to act.<sup>847</sup> The Court of Justice has therefore based its decision on a procedural rule, and it refused to assess the legality of the FFP. Nevertheless, before the decision of the Court, UEFA had already decided to amend the rules and relax the application of the sanctions.<sup>848</sup> Under these new amended Regulations, clubs that are in financial difficulties will be allowed to seek approval from UEFA through a 'voluntary settlement'. This will allow

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<sup>844</sup> See García B. and Weatherill, S. (2012) '*Engaging with the EU in order to minimise its impact: sport and the negotiation of the Treaty of Lisbon*', Journal of European Public Policy, 19 (2).

<sup>845</sup> Football Agent Daniel Striani, and groups of Manchester City and PSG fans.

<sup>846</sup> Court of Justice of the European Union, Order of the Court - 16 July 2015, Case C-299/15, Striani and Others, nyr.

<sup>847</sup> As Switzerland is not a Member State of the EU, the Lugano II Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters regulates the matter. As mentioned before, the complainant in this case was a football agent, only indirectly affected by the regulations.

<sup>848</sup> See the new UEFA Club Licensing and Financial Fair Play Regulations, available at [http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/28/41/2262841\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/Tech/uefaorg/General/02/26/28/41/2262841_DOWNLOAD.pdf)



them to move beyond the limits of the break-even rule, provided that they have a solid plan to improve their situation. Moreover, exceptions may be made for clubs from countries where the market is considered to have structural economic deficiencies.

This is a further example of the way chosen by the Commission to deal with Sports Governing Bodies. The mere threat of an investigation, or a complaint, has steered the conduct of Governing Bodies towards positions more in line with principles of good governance. The shift towards a horizontal system of rule-setting would be further enhanced if there was greater use of Social Dialogue.

## **9. Conclusion**

This chapter has discussed the main restrictions that Sports Governing Bodies place on the sports labour market. These arrangements are capable of affecting all the three markets that have been identified in relation to the sports industry. Indeed, they firstly affect the labour market, which is the supply market, where clubs purchase or sell the players. As they have an impact on the conduct of clubs on the players' market, the regulations discussed in this chapter are also likely to produce an effect on the upstream market where the sporting event is produced. Finally, as the quality of the product offered may be affected by these arrangements, they can also have spin-off effects on the exploitation market, where the product is placed on the market.

The chapter has demonstrated how easily the conduct of Sports Governing Bodies on the labour market may infringe competition law. The way Sports Governing Bodies exercise their regulatory power over the sports labour market represents the epitome of the specificity of sport. The level of control and the restrictions imposed on players and clubs cannot be found in any other industry.<sup>849</sup> However, not every arrangement can be considered inherent to sport, and hence it is argued that this system may fail the *Meca-Medina* test. The exceptions could be represented by the existence of transfer windows and the adoption of mandatory release clauses. In this regard, however, the

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<sup>849</sup> Arguably, a comparison could be drawn only between the regulation of the activity of players' agents and other professions which require a certain standard and the fulfilment of conditions.

proportionality test should be applied to assess whether the restrictions caused go beyond the pursuit of legitimate aims.

Nevertheless, it has been highlighted how the European Commission has showed a significant level of understanding of the economic and regulatory objectives pursued by Governing Bodies.<sup>850</sup> This may have to be related to the political ability of the Sports Associations rather than based on the legal acumen of their arguments.

The chapter has tried to provide an original contribution to the body of knowledge by identifying an objective that is inherent to the sport system and that certainly represents one of its specific features. The solidarity between clubs should constitute the foundation of the sport system: regulations that pursue the aim of enhancing the competitive balance should also impose a greater degree of solidarity amongst teams and perhaps leagues. Indeed, despite all the rhetoric behind restrictive rules and the pursuit of competitive balance, inequality could be easily addressed through solidarity payments.

In this regard, it is apparent how the reference to Article 165 TFEU in this area has been limited.<sup>851</sup> It is in this very context that the chapter has highlighted how the recourse to Social Dialogue would help to effectively pursue both aims of improving working conditions and employment relations, and provide an exemption blanket under Antitrust law for the arrangements agreed through the instrument. Institutions, Governing Bodies and stakeholders need to commit and promote more strongly this tool as a form of regulation. The fairness, the openness and the particular nature of sport could find the perfect venue for an informed and fruitful discussion where the majority of sports stakeholders would be able to make their voices heard.

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<sup>850</sup> See the Commission Decision on the Cooperation with UEFA and the position therein expressed in relation to the Financial Fair Play rule. See C(2014) 7378 final, Commission Decision of 14.10.2014 adopting the Arrangement for Cooperation between the European Commission and the Union of European Football Associations (UEFA).

<sup>851</sup> It is acknowledged that this may be attributed to the limited number of cases analysed by the European institutions since the adoption of the provision.

## CHAPTER FIVE: Sports Broadcasting Rights

**1. Introduction; 2. Multiple Markets, multiple Restrictions; 3. Collective Selling: Restrictions and Efficiencies; 3.1 The Case Law; 3.1.1 *Champions League*; 3.1.2 *Bundesliga and Premier League*; 3.1.3 *Murphy*; 4. The consumer welfare; 4.1 The Interest of Consumers in the analyses of the Commission; 4.2 The impulse of National Competition Authorities; 4.3 Consumers and Exclusivity; 5. Right to Major Events (AVMS Directive); 5.1 The effects of the Directive on the Market; 5.2 Challenges to the List of Major Events; 6. The Territoriality exclusivity v. the market; 7. Collective Purchasing; 8. Conclusion**

### **1. Introduction**

The focus of this chapter is to discuss the area of commercial rules and exploitation of commercial rights in sport. In particular, the example of sports broadcasting rights will be considered. Within the landscape of sports rights, broadcasting rights have progressively gained importance in the last few decades: sport leagues and associations have realised that these can be assets to be exploited. As supplier of the product, leagues and associations have therefore become an important player in the sports broadcasting market.<sup>852</sup> Most of them have thus decided to commercialise their product collectively, and share the revenues between the teams. Similarly, on the other side of the market, some broadcasters have managed to come together into an association, to counterbalance the power of sport Associations and Federations, and purchase jointly the rights to sporting events.

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<sup>852</sup> A forecast of the turnover for the 2014 FIFA World Cup in Brazil estimated a 66% increase of revenues from the previous edition (*Forbes.com*). The 2010 FIFA South Africa World Cup had a commercial value estimated of EUR 3.5 Billions, and it had generated an increasing of 2% of the turnovers in advertising at a global level (*Sportseconomy.it*).

The commercial aspects that so strongly characterise the exploitation of broadcasting rights cannot be underestimated, and they will help shedding a light on the fundamental questions that underlie this research. The analysis of the application of competition law to sports related matters finds a fertile ground in this sector, where economic considerations have to be balanced with social, cultural and even political values.<sup>853</sup> That of broadcasting rights represent therefore the best arena to test the relevance of the specificity of sport, in order to establish whether the nature of the activity has affected the assessment carried out by antitrust authorities, and to evaluate the impact of Article 165 TFEU with its reference to the openness and fairness for sport. In parallel, this chapter will endeavour to establish whether the economic analysis undertaken by the European institutions has respected the letter of the norm. In this context, this research will try to provide an original contribution to the body of knowledge in relation to the role of consumers' interest and its importance for an exemption under Article 101(3) TFEU. As opposed to other areas, in relation to commercial rights the role of Social Dialogue is necessarily limited. However, it is submitted that the involvement of a broad range of industry stakeholders, including fans, could help guaranteeing that the way chosen by Governing Bodies to pursue their objective is legitimate.

The collective selling of sports broadcasting rights is a type of conduct capable of raising legal concerns in an antitrust perspective, since it clearly implies a restriction of the competition. Arrangements of this kind prevent single clubs from operating freely on the market, and impose on the broadcasters an obligation to bargain with an entity provided with a monopoly, or quasi-monopoly power. Moreover, this type of conduct is also capable of affecting the final consumers. Indeed, collective selling may restrict their ability of choosing the supplier and the product, the type of subscription and the prices that they will have to pay, and it could ultimately entail a constraint of their right to access information. Similarly, also a system of joint purchasing might lead to restrictions in relation to the freedom of its members, and the mode of exploitation of the rights. In this context, the freedom of broadcasters and sporting organisations is

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<sup>853</sup> See Evens, T., Smith, P., & Iosifidis, P., (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan, p.69.

further constrained where European institutions have decided to protect some major events in light of their importance for the society. While the cultural importance of these events may justify measures of this sort, they clearly limit the ability of broadcaster of exploiting these rights.

The restrictions produced by collective agreements are often counterbalanced with some positive and pro-competitive effects. These are usually defined in terms of economic efficiency, but they could also entail other forms of benefit for the system.<sup>854</sup> Moreover, in order to justify collective selling agreements and the restriction they are capable of creating, sporting bodies claim a positive effect on the competitive balance of the leagues and competitions they organise, as a result of the sharing of the revenues obtained.<sup>855</sup> In turn, this would ultimately lead to a more profitable product when placed on the market, and a more effective promotion of clubs in smaller markets. However, it has to be stressed that these effects are neither an immediate consequence of the collective selling, nor they can be obtained exclusively through restrictive conduct of the type in question.<sup>856</sup>

The objective of this section is to analyse the current approach of the European institutions in regard to this topic, and outline common trends and problems, while keeping into account the theme of sporting specificities.

## **2. Multiple Markets, multiple restrictions**

In order to fully understand the complexities characterising the collective selling of broadcasting rights, it is first necessary to understand which markets may be interested

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<sup>854</sup> Other aspects might be related to externalities connected to the cultural aspect of accessing to sports content, as a means to catalyse the national identity and build social cohesion, but also as a way to promote physical activity and enhance the health condition of the citizen. See Jeanrenaud, C. & Késenne, S. (2006), *The economics of sport and the media*, Edward Elgar, Cheltenham.

<sup>855</sup> See Szymanski, S., (2003), *The economic design of sporting contests*, in *Journal of Economic Literature*, 41, pp. 1137–1187 for a study on the relation between collective selling of broadcasting rights and competitive balance.

<sup>856</sup> In particular, it is not the collective selling that is capable of enhancing the competitive balance of a League, but a redistributive mechanism of the revenue. And collective selling is not the only possible way to share revenues between teams taking part to the competition. See the Decision of the European Commission in Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para 131.

by collusive conduct, and thus also the parties that might be negatively affected by the restriction. As for any other competition law matter, in fact, the framework in which to consider a conduct is the specific relevant market in which the latter produces its effects.<sup>857</sup>

The first market that will be affected by a collective selling of broadcasting rights is the upstream market,<sup>858</sup> where media operators purchase the rights from the right-owners, the Leagues or Associations. The Commission has identified different upstream product markets for the acquisition of sports media rights on the basis of some specific criteria, such as the attractiveness of the event transmitted, both for the viewers and the advertisers, the characteristics of the event itself and also national preferences.<sup>859</sup>

On the upstream market a possible restriction resulting from the collective selling will mainly affect broadcasters and media operators, but it might also have an impact on the clubs. When the clubs associated in a league entrust the selling of their media rights to the association itself, such a horizontal agreement prevents individual clubs from competing with each other in the sale of those rights. Furthermore, the setting of one price for all the rights constitutes a form of price fixing, a type of conduct explicitly prohibited under Article 101 TFEU.<sup>860</sup> Moreover, as a consequence of joint selling agreements, the number of rights available to be purchased might be reduced,<sup>861</sup> and therefore the system could also lead to output restrictions.<sup>862</sup>

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<sup>857</sup> See Jones, A. & Sufrin, B.E. (2013), *EU competition law: text, cases, and materials*, Oxford University Press, Oxford, 5th ed., p.62.

<sup>858</sup> Decision of the European Commission in Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 56 and for a summary Kienapfel P, Stein A, (2007). *The Application of Articles 81 and 82 EC in the sport sector*, Competition Policy Newsletter 3: 6-14.

<sup>859</sup> See Decision of the European Commission in Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, Section 4.1.3. and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>860</sup> See *supra* chapter 2. Article 101 TFEU explicitly mentions as prohibited those agreements [...] which 'directly or indirectly fix purchase or selling prices or any other trading condition'.

<sup>861</sup> Toft, R., (2006), *Sports Law and Business Competition Law Review Key Developments and the Latest Cases*, European Commission; Articles about Competition Law, Comp/C.2/TT/hvds D(2005), available at [http://ec.europa.eu/competition/speeches/text/sp2006\\_001\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2006_001_en.pdf).

<sup>862</sup> Geeraert, A., (2013). *Limits to the autonomy of sport: EU law*, in: J. Alm, ed. *Action for good governance in international sports organisations*. Copenhagen: Play the Game/Danish Institute for Sports Studies, 151–184.

On the other side, on the downstream markets, media operators have to compete for audience and advertising revenues: this is where they deliver the product to the public.<sup>863</sup> The conditions of the market at the upstream level affect also the competitive structure at the downstream level.<sup>864</sup> A system of collective commercialisation might create barriers to entry in the downstream market, especially where an undertaking holds a dominant position, with a subsequent effect of access foreclosure for new media operators.

Against this background, there is a further element to be considered. Indeed, there is a difference between broadcasters that operate free to air, and pay TV broadcasters, in light of the characteristics of the transmission of the signal and the funding available to them.<sup>865</sup> While pay TV operators are normally funded through subscription fees, therefore paid directly by their customers, free to air television can rely on the only source of income provided by their ability to sell advertising slots on their channels, and State contributions.<sup>866</sup> Despite this difference, however, for both types of broadcaster sports rights represent an indispensable input in order to attract the audience.<sup>867</sup>

The Commission has consistently held that the downstream market for sports media content has a national character, due to linguistic barriers, preferences and legislative

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<sup>863</sup> See Decision of the European Commission in Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 80.

<sup>864</sup> Gérardin, D. (2004), *Access to Content by new Media Platforms: A Review of the Competition Law Problems*, GCLC Working Paper.

<sup>865</sup> Furthermore, with the development of the internet, New Media Operators should be taken into account as well, as important players on the downstream market. For a discussion on the role of the New Media in the framework of sports rights, see Lefever, K (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, p.10.

<sup>866</sup> Such as licence fees or taxes. See Recital 53 of the Directive 2010/13/EU of the European Parliament and of the Council. See also European Commission (2000) Notification of 14 July 2000 pursuant to Article 4 of Council Regulation No 4064/89 (Case COMP/M.2050 – Vivendi/Canal+/Seagram) 13 Oct 2000, and Lefever, K (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, p.242.

<sup>867</sup> See the famous quote from Mr Murdoch, which in 1996 explained the strategy behind his pay TV empire: 'use sports as a 'battering ram' and a lead offering in all our pay television operations', see <http://www.independent.co.uk/sport/sport-is-murdochs-battering-ram-for-pay-tv-1358686.html>. This consideration was later confirmed in the Decision of the European Commission in Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 20. For a discussion about the importance of sports rights for broadcasters, see Evens, T, Smith, P, & Iosifidis, P., (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan.

measures.<sup>868</sup> This consideration, however, could be the object of further assessment in light of the development of the market for broadcasting rights and the evolution of customers' preferences.<sup>869</sup>

### 3. Collective Selling: Restrictions and Efficiencies

A league that sells collectively the broadcasting rights related to the competition it organises behaves as a cartel, or as an association of undertakings. In fact, the clubs that constitute the league are by all means undertakings within the scope of Article 101 TFEU, as they carry out economic activities.<sup>870</sup>

In general terms, a collective selling arrangement between a League or an Association of Leagues and broadcasters is likely to infringe Article 101(1) TFEU, as it is capable to lead to the setting of uniform prices, if compared with a system of individual selling of rights, and is also likely to inflate prices for both broadcasters and consumers.<sup>871</sup> Moreover, this type of agreement restricts football clubs from exploiting their rights individually and freely.<sup>872</sup>

If the agreement falls under the scope of Article 101, and the restriction of the competition is appreciable, the conduct itself can be exempted from the prohibition

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<sup>868</sup> See the Decision of the Commission in Case 37398, Joint selling of the commercial rights of the UEFA Champions League, OJ 2003 L 291/25, para. 90, and also in Case COMP/38.173, Collective selling of FA Premier League's broadcasting rights, at para. 23, and finally in Case COMP/C-2/37.214 - Joint selling of the media rights to the German Bundesliga at para. 19.

<sup>869</sup> In the case Case QC Leisure (C-403/08) /Murphy (C-429/08) [2011] ECR I-09083 at para. 140, and, Case 62/79 Coditel and Others ('Coditel I') [1980] ECR 881 (see *infra*), the Court of Justice held that national territorial exclusivity in licensing broadcasting rights is capable of partitioning the common market and thus contrary to the freedom to provide services protected by Article 56 TFEU. It has to be noted also that at para. 43 of the Judgment in the mentioned Joint Cases C-403/08 and C-429/08, the Court referred to the submission of the FAPL, which hold that in the context of the licensing of broadcasting rights on a territorial basis '*the broadcaster selling the cheapest decoder cards has the potential to become, in practice, the broadcaster at European level, which would result in broadcast rights in the European Union having to be granted at European level.*'

<sup>870</sup> See *supra*, Market Values chapter for the definition of undertaking under EU competition law, and Case C-41/90 Judgment of the Court (Sixth Chamber) of 23 April 1991 - *Klaus Höfner and Fritz Elser v Macrotron GmbH*, [1991] ECR I-1979, para. 21.

<sup>871</sup> See the speech 00/152 of European Commissioner Mario Monti '*Sport and Competition*', at a Commission organised conference on Sport, Press Release 17<sup>th</sup> April 2000.

<sup>872</sup> See *Study on sports organisers' rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture, at p. 77.



only when the four conditions laid down by Article 101(3) TFEU are fulfilled. This means that, in order to exempt a restrictive arrangement, the relevant authority should carry out an analysis which weighs up its anticompetitive and pro-competitive effects, and considers that the latter prevail over the former.<sup>873</sup> It is possible that an agreement presents pro-competitive effects that are overall capable of outweighing the anticompetitive nature of the restriction, even when only some of the conditions previously stated are fulfilled.<sup>874</sup> However, in light of the cumulative requirement expressed by the Commission in its Guidelines on the application of Article 101(3) TFEU,<sup>875</sup> all the conditions provided for in the article have to be present in order to exempt the agreement.

The following section will discuss the case law and the decision practice of the EU institutions in this sector.

### 3.1. The Case Law

#### 3.1.1 *The UEFA Champions League – Decision COMP/C.2-37.398*

The most important case that has been subject to assessment by the EU institutions in relation to this concerns the mode of selling used by UEFA for the rights of the Champions League.<sup>876</sup> In this regard, the Commission has recognised the legality under EU law of a cartelization of the market for broadcasting rights related to the most prestigious competition for clubs organised by UEFA.<sup>877</sup>

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<sup>873</sup> See Case T-112/99, *Métropole télévision (M6) and others*, [2001] ECR II-2459, paragraph 74, and Case T-328/03, *O2*, [2006] ECR II-1231, paragraphs 69 *et seq.* See for a discussion in relation to the application of this principle in sport Budzinski, O., (2011), *The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets*. University of Southern Denmark Department of Environmental and Business Economics - Markets and Competition Working Paper No. 2011-0124. Available at SSRN: <http://ssrn.com/abstract=1746948>.

<sup>874</sup> Especially in relation to the benefit that the restriction should grant to consumers. See Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>875</sup> As from Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [Official Journal No C 101 of 27.4.2004].

<sup>876</sup> Commission Decision COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League.

<sup>877</sup> Although for the European Championship, ‘EURO’, UEFA is usually able to collect higher revenues, this competition is only staged every four years. The Champions League, on the other hand, is a competition

The Champions League is divided in a preliminary stage, a group stage and the final phase. UEFA distributed the broadcasting rights of the group stage and of the final phase on behalf of the teams taking part to the competition.<sup>878</sup> Through this arrangement, the Association sold free to air and pay TV rights on an exclusive basis to a single TV broadcaster per territory, in a multi-year package.<sup>879</sup> On one hand buyers had only one source of supply, UEFA, and on the other the system made it possible for a single large broadcaster per Member State to acquire all the rights, without any differentiation related to the platform to which they were destined or the form of exploitation they involved.<sup>880</sup> Hence, this system prevented clubs from exploiting the rights individually, and it also had the potential to foreclose the market, by excluding other interested broadcasters, in light of the duration of the exclusive deal concluded. Since all the rights were sold in one bundle, it could also result in a number of rights left unexploited, therefore causing output restrictions on the downstream market.<sup>881</sup> In this instance, the Commission identified the relevant market as the market for the acquisition and resale of broadcasting rights for high-level football events played regularly throughout the year, and considered it separated from the market related to other events taking place in different periods.<sup>882</sup>

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amongst European clubs organised every year by UEFA, hence the greater relevance of the revenues related to the latter.

See UEFA 2012/2013 Financial Report, available at

[http://www.uefa.org/MultimediaFiles/Download/uefaorg/Administration/02/07/89/16/2078916\\_DOWNLOAD.pdf](http://www.uefa.org/MultimediaFiles/Download/uefaorg/Administration/02/07/89/16/2078916_DOWNLOAD.pdf), Accessed on 05/01/2015.

<sup>878</sup> The exploitation of the rights related to the preliminary stage was left to the clubs. This arrangement was established within the UEFA Regulations: it was a condition for entry into the Champions League that all the Associations and Football Clubs agreed to the UEFA Statutes and Regulations, thereby including the joint selling system. See the Decision COMP/C.2-37.398 at para. 2.

<sup>879</sup> See *idem*, at para. 3.2.

<sup>880</sup> Broadcasting rights might grant the possibility to show the live match, or the highlights, or the transmission of the images after the expiration of a certain time.

<sup>881</sup> See the Decision COMP/C.2-37.398 at para 3.2 and for a discussion on the restrictive effects of joint selling on the market see the *Study on sports organisers' rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture, p. 77, and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>882</sup> Such as the World Cup, or the EURO European Championship, which take place every four years. See Decision COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League, para 4.1.3.

Despite the restrictive nature of the arrangement, the Commission exempted the conduct under Article 101(3) TFEU, in light of a number of pro-competitive benefits created, although subject to certain conditions. Indeed, the Commission recognised that a collective system allows for a single point of sale and this facilitates the efficient exploitation of rights, by reducing transaction costs that have to be borne by the broadcasters, as the negotiations will take place only with one partner.<sup>883</sup> The system also contributes to the creation of a well-known brand, managed independently of the interests of individual clubs, and it provides a more effective system to protect and enforce trademark rights.<sup>884</sup> Moreover, broadcasters can plan their programming in advance, rather than having to wait for the individual progress of a club in the competition, with the financial risks that this would involve.<sup>885</sup> The system might also guarantee a higher degree of satisfaction of consumers' demand, as it provides coverage of the entire tournament.<sup>886</sup>

However, in order to curb the anti-competitive effects of the system, the Commission required a number of amendments to the arrangement. First, it imposed a competitive bidding process for the acquisition of the rights. The process would have to be carried out under non-discriminatory and transparent terms, in order to give all potential buyers an opportunity to compete.<sup>887</sup> Moreover, to prevent and limit possible positions of dominance on the downstream market, and consequent foreclosure effects, UEFA had to limit the duration of exclusive deals to a period not exceeding three *Champions League* seasons.<sup>888</sup> Furthermore, the rights could not be sold in a bundle, but had to be fragmented into different packages, each conferring the right to broadcast specific

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<sup>883</sup> See *idem*, at para. 148.

<sup>884</sup> See *idem*, at paras 154-157 and 179. For a discussion related to these aspects see Daly, K, Walch, J (2012) *Sports and competition law: An overview of EU and national case law*, e-Competitions, No42447, and Parrish, R., & Miettinen, S. (2009) *The Sporting Exception in European Union Law*. T.C.M. Asser Instituut, and also Van der Wolk, A (2006), *Sports broadcasting: fair play from a EU competition perspective* (European Commission) (Case study)', *The International Sports Law Journal*, 1-2, p. 8.

<sup>885</sup> See Decision COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League at para. 149.

<sup>886</sup> See *idem*, at para. 145.

<sup>887</sup> See *idem* at para 3.4.1.2, and for a summary of these aspects see Kienapfel P, Stein A, (2007) *The Application of Articles 81 and 82 EC in the sport sector*, *Competition Policy Newsletter* 3: 6-14.

<sup>888</sup> See the Decision COMP/C.2-37.398 at para 3.

contents on different platforms.<sup>889</sup> Accordingly, to reduce possible output restrictions, UEFA had to assure that no rights would have been left unused, by allowing the clubs to individually sell certain rights that UEFA was not able to commercialise.<sup>890</sup> Similarly, for other less valuable rights, such as deferred highlights and new media rights, the Commission required a parallel exploitation by the clubs and UEFA.<sup>891</sup> From the analysis of the Decision, it becomes apparent that the assessment was not made precisely and exclusively in light of the specific features of sport. Indeed, despite a mention of the specificity of sport, the Commission considered the arrangement merely under an antitrust perspective,<sup>892</sup> and explicitly held that further reasoning related to the solidarity<sup>893</sup> of the system was not necessary, in light of the other pro-competitive effects of the system.<sup>894</sup> The remedies identified by the Commission in the *Champions League* case, although valid as guidance for future cases, were not exhaustive. Depending on the circumstances of each case and the market analysed, new and different remedies could be adopted.<sup>895</sup>

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<sup>889</sup> See *idem* at para 3.4.1.3. For a discussion on the subdivision of the right in packages see Weatherill, S (2006), *The sale of rights to broadcast sporting events under EC law* (European Community)', The International Sports Law Journal, 3-4, p. 3, and Geey, D. (2004), *Collectivity v Exclusivity: Conflict in the Broadcasting Arena*, Entertainment Law Review, 15, pp. 7-11.

<sup>890</sup> The so-called fall back option.

<sup>891</sup> See the Decision COMP/C.2-37.398 at para 3.4.1.3 (38) and for a discussion related to this aspect Geeraert, A., (2013). *Limits to the autonomy of sport: EU law*, in: J. Alm, ed. *Action for good governance in international sports organisations*. Copenhagen: Play the Game/Danish Institute for Sports Studies, 151–184.

<sup>892</sup> See Decision COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League at para. 131. The Commission, after having mentioned the specificity as a factor taken into account, asked UEFA to demonstrate the necessary nature of the restriction, revealing the orthodox and economic nature of the assessment. This was confirmed also by Kienapfel and Stein, according to whom the financial solidarity argument had no impact on the Assessment under Article 101(3). See Kienapfel P, Stein A, (2007) *The Application of Articles 81 and 82 EC in the sport sector*, Competition Policy Newsletter 3, at p. 12.

<sup>893</sup> Advocate General Lenz in *Bosman* held that in order to maintain or increase the competitive balance of the league an acceptable alternative to the transfer system could have been the collective selling of broadcasting rights. See Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR 1995 Page I-0492, Opinion of AG Lenz.

<sup>894</sup> See Decision COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League at para. 167.

<sup>895</sup> This type of approach was confirmed in the Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936} at para 3.1.3.2. For a discussion see Lefever, K (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, c2012, p.140.

### 3.1.2 Bundesliga and Premier League

Following the *Champions League* Case, the Commission analysed the system of collective selling of rights adopted by the German Bundesliga and the English Premier League.<sup>896</sup> The Decision discussed above was still used as a model to shape the amendments that were imposed in these cases.<sup>897</sup> However, as a point of difference from the decision in *Champions League*, these cases were concluded with Commitment Decisions,<sup>898</sup> by which the Commission simply accepted and made binding the amendments proposed by the Bundesliga and the Premier League.<sup>899</sup> In relation to the *German Bundesliga* case, in particular, there was no need to impose further conditions, in respect of those already established in *Champions League*.<sup>900</sup>

#### 3.1.2.1 Bundesliga – Case COMP/C-2/37.214

The *Liga-Fußballverband e.V.*<sup>901</sup> is the Football League Association in Germany and it is entitled to organise the competition and commercially exploit the rights related to the matches of the first and second national football division.<sup>902</sup> The DFB applied for a negative clearance under Council Regulation 17/1962,<sup>903</sup> or an exemption under Article 101(3) TFEU. The Commission, in a preliminary assessment, considered that the collective selling system adopted by the League Association, amounting to a decision of an association of undertakings under Article 101(1) TFEU, was capable of restricting the competition between the member clubs and raised concerns similar to

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<sup>896</sup> See Case COMP/38.173, *Collective selling of FA Premier League's broadcasting rights*, and Case No IV/37.214 - DFB - *Central marketing of TV and radio broadcasting rights for certain football competitions in Germany*.

<sup>897</sup> Iosifidis, P. & Smith, P. (2011). *The European Television Sports Rights Market: Balancing Culture and Commerce*. Paper presented at the Private Television in Europe, 28 - 29 Apr 2011, Brussels, Belgium.

<sup>898</sup> As from Article 9 of the Council Regulation (EC) No 1/2003. See *supra*, chapter 1.

<sup>899</sup> Rompuy, B. V., (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>900</sup> However, the National Competition Authority held that such a system was not effectively granting the required share of the benefits to consumers. See *infra* para. 4.2.

<sup>901</sup> The League Association is a registered association and ordinary member of the Deutscher Fußballbund 'DFB', the German Football Association. The League Association is the sole shareholder in Deutsche Fußball Liga GmbH, 'DFL', which conduct the operational business of the League Association. The clubs are contractually bound to the League Association and the DFB. See Commission Decision in Case COMP/C-2/37.214 - *Joint selling of the media rights to the German Bundesliga*, para. 2.

<sup>902</sup> Bundesliga 1 and Bundesliga 2.

<sup>903</sup> Subsequently replaced by Regulation 1/2003. See *supra* chapter 1.

those discussed in the *Champions League* case.<sup>904</sup> Moreover, possible efficiencies created by the joint selling system were held to be outweighed by the restrictive effects.<sup>905</sup>

The League Association hence had to propose a number of amendments, in order to placate the concerns raised by the system, enhance the transparency of the tendering procedure and grant the possibility to individual clubs of exploiting some of the rights.<sup>906</sup> The Commission accepted these commitments as sufficient to address the antitrust concern under Article 101(1) TFEU, and made them binding.<sup>907</sup> From the analysis of the Decision it is possible to observe how the argument of the specificity of sport did not arise in this instance either, and the Commitments were exclusively put in place to address antitrust concerns.

### 3.1.2.2 Premier League – Case COMP/38.173

The Football Association Premier League<sup>908</sup> organises the top flight football competition for club in England. Through its Rules and regulations, FAPL sold media rights<sup>909</sup> packages on behalf of its clubs to broadcasters on an exclusive basis. Clubs were prevented from selling rights individually, even those rights not included in the packages on sale. In June 2001, the Commission opened an investigation on the selling of Premier League's rights, leading to a statement of objections, issued in December 2002.<sup>910</sup> The Commission concluded that the selling arrangement was in breach of

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<sup>904</sup> Commission Decision on the case COMP/C-2/37.214, para. 17.

<sup>905</sup> See *idem*, para. 24.

<sup>906</sup> As in the *Champions League* case, the amendments were related to the tendering procedure, the limitation of the duration of exclusive contracts, and the limitation of their scope through the unbundling of the rights. See *idem*, para. 27- 35.

<sup>907</sup> See *idem*, Article 1.

<sup>908</sup> The Football Association Premier League, 'FAPL', is a private company created in 1992, owned by its 20 member clubs. These clubs, alongside with the Football Association, are the shareholder of the League and are entitled to propose and vote amendments to the Premier League Rule Book. The Premier League Rule Book serves as a contract between the League, the Member Clubs and one another, defining the structure and running of the competition. See the official website <http://www.premierleague.com>.

<sup>909</sup> According to para. 1 of the Commission Decision COMP/38.173, Media Rights are the rights to make available audio-visual content of play during Premier League matches in any form and using any method of transmission or distribution.

<sup>910</sup> See Press Release IP/02/1951 - Commission opens proceedings into joint selling of media rights to the English Premier League.

Article 101 TFEU, and did not fulfil the criteria for an exemption.<sup>911</sup> The system was held not to comply with the rules of competition law, as it prevented clubs from undertaking independent commercial activity in relation to broadcasting rights,<sup>912</sup> and the exclusive sale of large packages created barriers to entry on the market, leading to concentrations between operators and hampering the competition. Finally, the arrangement led also to output restrictions and foreclosure on the downstream market.<sup>913</sup>

The FAPL reacted to the complaint by proposing a number of amendments to the system, with the aim of reducing the output restrictions and enhance the transparency of the tendering system.<sup>914</sup> As mentioned before, most of the amendments replicated the changes imposed in the *Champions League* case. However, for the Premier League the Commission required some further commitments,<sup>915</sup> as the relevant market presented some significant differences with the one analysed in the *Champions League* Case, in particular in relation to the position held by the incumbent broadcaster on the market. Indeed, despite the subdivision in packages, the dominant player BskyB was still able to purchase all the packages, therefore creating an entry barrier on the market. The Commission required the imposition of a ban on the acquisition of all the packages by a single broadcaster, the so-called no single buyer rule.<sup>916</sup> Furthermore, the practice of BskyB of offering a bonus to the seller on the condition that all valuable rights would have been sold to it was considered unacceptable. The Commission thus required an obligation on the seller to accept only stand-alone unconditional bids for each individual package, and that the tender procedure was to be overseen by a trustee which then had to report back to the Commission.<sup>917</sup>

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<sup>911</sup> See Commission Decision COMP/38.173, para. 12.

<sup>912</sup> See Notice published pursuant to Article 19(3) of Council Regulation No 17 concerning case COMP/C.2/38.173 and 38.453 - joint selling of the media rights of the FA Premier League on an exclusive basis, at para. 4.

<sup>913</sup> See *idem*, at para. 7.

<sup>914</sup> See Commission Decision COMP/38.173, paras. 32 and 33.

<sup>915</sup> See *idem*, at para. 36.

<sup>916</sup> See *idem*, at para. 32.

<sup>917</sup> See *idem*, para 36(e), and Kienapfel P, Stein A, (2007), *The Application of Articles 81 and 82 EC in the sport sector*, Competition Policy Newsletter 3: 6-14.

It must be noticed that in the press release announcing the opening of the investigation, the Commission mentioned the specific features of sport and the objective of pursuing the solidarity of the system.<sup>918</sup> However, the institution already held that the joint selling system was not indispensable for guaranteeing the solidarity between Premier League clubs. On the other hand, in the Decision accepting the commitment undertaken by the FAPL there is no reference to the specific features of sport. The fact that the object of the broadcasting rights is a sporting competition is taken into account only as a characteristic of the product sold on a specific market.<sup>919</sup>

### **3.1.3. *Murphy - Cases C-403/08 and C-429/08***

The theme of collective selling and broadcasting rights arose again in *Murphy*.<sup>920</sup> The Court of Justice was called to assess a number of issues related to the broadcasting sales policy of the Premier League, which granted national licensees the exclusive right to broadcast matches on a country-by-country basis.<sup>921</sup>

In order to maximise the value of the rights, FAPL sold them on a territorial basis, granting the purchasing broadcaster the exclusive right for the live transmission of the matches in the area. Accordingly, the awarded broadcasters had to ensure that their transmission was safe from any attempt of decryption from any viewer outside the territory of the Member State for which they had acquired the rights.<sup>922</sup> In the UK, the licensed broadcaster was BskyB, and anyone who wanted to access Premier League matches had to subscribe to this pay TV operator. However, a number of bars and restaurants started to use foreign devices to access Premier League matches, because they are substantially cheaper than the subscription with BskyB. These devices,

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<sup>918</sup> See Press Release IP/02/1951 - Commission opens proceedings into joint selling of media rights to the English Premier League.

<sup>919</sup> See Decision COMP/38.173, section 5.2.

<sup>920</sup> Judgment of the CJEU in Cases C-403/08 and C-429/08. *Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083.

<sup>921</sup> See *idem*, at para. 30. For a discussion see also Parrish, R., (2012), *Lex sportiva and EU sports law*, in *European Law Review*, 6, pp. 11 et seq.

<sup>922</sup> See Judgment of the CJEU in Cases C-403/08 and C-429/08, paras. 36 -37.



alongside the subscription to a foreign satellite channel, were legitimately purchased, but used in an unauthorised manner as contrary to the licensing conditions.<sup>923</sup>

To protect its territorial model, FAPL took enforcement actions in civil proceeding and private prosecutions against the suppliers of the equipment and devices to the public houses,<sup>924</sup> and an owner of a public house, Ms. Murphy, that was using a Greek decoder, legitimately purchased, to broadcast Premier League matches in her pub.<sup>925</sup>

The High Court of Justice decided to stay the proceedings pending before it and refer a series of questions to the Court of Justice for a preliminary ruling in relation to the compliance of the licensing policy with EU law. In particular, and besides the questions related to the application of copyright to sports broadcasting rights, which are not relevant in the context of this research,<sup>926</sup> the Court of Justice was called to rule on the legality of the licensing system under freedom to provide services and competition law. The Court therefore held that the system restricted the cross-border provision of services, which is protected under Article 56 TFEU.<sup>927</sup> A legislation that prevents the use of a device in a Member State, different from the one where it has been purchased, has the effect of preventing the access to the service, which is prohibited unless objectively justified.<sup>928</sup>

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<sup>923</sup> See *idem*, para. 42.

<sup>924</sup> Case C-403/08, before the High Court of England and Wales, Chancery Division, for the infringement of their rights protected under Section 298 of the Copyright Design and Patents Act, by trading in or being in possession for commercial purposes of foreign decoding devices designed or adapted to give access to the services of FAPL and others without authorisation. See Case QC Leisure (C-403/08) /Murphy (C-429/08), para. 46.

<sup>925</sup> Case C-429/08. The FAPL brought Ms Murphy before Portsmouth Magistrates' Court, and had her convicted of two offences under section 297(1) of the Copyright, Designs and Patents Act, as she had dishonestly received a programme with intent to avoid the due payment. Ms. Murphy subsequently appealed the decision before the Crown Court and, by way of case stated, before the High Court. See Case QC Leisure (C-403/08) /Murphy (C-429/08), paras. 52 - 53.

<sup>926</sup> To summarise the main finding in this regard, the Court held that FAPL cannot claim copyright protection on the Premier League matches themselves. See Case QC Leisure (C-403/08) /Murphy (C-429/08), paras. 96 *et seq.* For a discussion of these aspects see *Study on sports organisers' rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture, pp. 29 *et seq.*

<sup>927</sup> Article 56 of TFEU requires the abolition of all restrictions to the freedom to provide services within the internal market; this freedom is for the benefit of both providers and recipients of services. See Cases C-403/08 and C-429/08 para. 85.

<sup>928</sup> See *idem*, para. 87.

It is in this context that the Court has mentioned Article 165 TFEU and its prescription of taking into account the specific features of sport.<sup>929</sup> In the interpretation of the Court, this provision would allow Member States to grant protection to a sporting event and its organiser, but not to the point of creating a new set of rights.<sup>930</sup> Any measure of this kind, though, has to be proportionate and necessary to achieve the goals of public interest,<sup>931</sup> which were not present in the case in question.<sup>932</sup>

The Court then moved on to assess the compliance of the system with the provision of competition law. It held that, while exclusive licensing agreements are not in principle incompatible with EU law,<sup>933</sup> the arrangement in object constituted a restriction of the competition running contrary to the objectives of the Treaty, as it was capable of partitioning the market along national borders.<sup>934</sup> As the system restricted the cross-border provision of services, it had consequently the anti-competitive object of eliminating the competition between European broadcasters, prohibited under Article 101 TFEU.<sup>935</sup> The Court subsequently held that the arrangement could not fulfil the criteria set by Article 101(3) TFEU, as the obligations it involved were not necessary to pursue a legitimate objective.<sup>936</sup>

In its assessment under competition law, the Court did not specifically consider the content of the transmission, and therefore its relation to sport, as a matter capable of

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<sup>929</sup> See *idem*, para. 101.

<sup>930</sup> As pointed out in Parrish, R, (2012), '*Lex sportiva and EU sports law*', in *European Law Review*, 6, pp. 11 *et seq.*

<sup>931</sup> See Case QC Leisure (C-403/08) /Murphy (C-429/08) [2011] ECR I-09083 at para. 105, and, Case 62/79 Coditel and Others ('Coditel I') [1980] ECR 881, paras 15 and 16.

<sup>932</sup> See Case QC Leisure (C-403/08) /Murphy (C-429/08) [2011] ECR I-09083, at para. 125. However, in her Opinion, Advocate General Kokott held that the reason put forward by the FAPL in relation to the closed period of transmission, which would justify the restriction of the provision of services, does not merely respond to a commercial interest, but it pursues a sporting interest protected by Article 6(e) and Article 165 TFEU. Nevertheless, the AG Kokott stressed that FAPL had not demonstrated the need of such a form of protection. See Case QC Leisure (C-403/08) /Murphy (C-429/08) [2011] ECR I-09083, Opinion of AG, paras. 207 – 210.

<sup>933</sup> See Case QC Leisure (C-403/08) /Murphy (C-429/08) [2011] ECR I-09083, paras 137-138, citing Case 262/81 Coditel SA et al v Ciné-Vog Films SA et al (Coditel II) [1982] ECR 3381, para 15.

<sup>934</sup> See *idem*, at para. 139.

<sup>935</sup> See *idem*, at paras 140 – 144.

<sup>936</sup> See *idem*, at para 145 and see Lindholm, J and Kaburakis, A, (2013), *Cases C-403/08 and C-429/08 FA Premier League Ltd and Others v QC Leisure and Others; and Karen Murphy v Media Protection Services Ltd*, 4 Oct 2011. In Anderson, J. (Ed.) *Leading Cases in Sports Law*. Heidelberg, Germany: TMC Asser Press/Springer-Verlag, pp. 271-286. Available at SSRN: <http://ssrn.com/abstract=2288917>.

affecting its finding. Similarly, the theme of the specificity of sport did not arise in this instance.<sup>937</sup> The CJEU took no particular account of the specificities of the market for sports broadcasting rights, which had been earlier recognised by the Commission. In *UEFA*, the Commission had indeed stated that this peculiar market was still anchored to national preferences, and therefore closed and limited.<sup>938</sup> The prohibition of territorial exclusivity affirmed in *Murphy* might imply that the market for broadcasting right has now a more European dimension.<sup>939</sup>

#### 4. Consumers' Welfare

A point of interest in relation to the assessment of the cases discussed before is related to the benefit of consumers. The theme of consumers' welfare has indeed a fundamental relevance in connection with the exploitation of sport broadcasting rights, and in the context of the implementation and application of competition law.<sup>940</sup> Indeed, one of the conditions posed by Article 101(3) TFEU in order to exempt a restrictive agreement from the prohibition set is that consumers are able to enjoy a fair share of the benefits resulting from it.

In the case law of the European institutions, however, the analysis related to the realisation of this last condition has always been somewhat neglected. The benefit of consumers is frequently considered to exist when the other requirements posed by the norm are fulfilled, under the assumption that any economic efficiency created on the upstream market would automatically be passed on to final consumers.<sup>941</sup>

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<sup>937</sup> The Court however mentioned the specificity of sport, and Article 165 TFEU, in relation to the assessment of the conduct under Article 56 TFEU. See *supra* and Case QC Leisure (C-403/08) /Murphy (C-429/08), para. 101.

<sup>938</sup> See *supra*, note 18.

<sup>939</sup> Moya Izquierdo, S. and Troncoso Ferrer, M., (2014), *Football broadcasting business in the EU: towards fairer competition?*, Journal of European Competition Law & Practice.

<sup>940</sup> The interest of consumers should be protected through Article 101(3) TFEU and 102 TFEU, as one of the main objective of EU competition law. See the Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004], at para. 13, but also the speech of the then Vice President of the Commission *Competition – what's in it for consumers?* – Almunia, Vice President of the European Commission responsible for Competition Policy, *European Competition and Consumer Day* Poznan, 24 November 2011.

<sup>941</sup> Rompuy, B. V. (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

As mentioned before, the definition of consumer can be stretched to include those customers, such as wholesalers or retailers, which are not on the last link of the chain, final consumers in a strict sense.<sup>942</sup> The Guidelines of the Commission on the application of Article 101(3) TFEU state that this notion encompasses all the customers of the parties to the agreement, which might be direct and indirect users of the product, therefore including producers that use the good as an input, wholesalers, retailers and, lastly, also final consumers.<sup>943</sup> Indeed, as established in *T-mobile Netherlands BV*,<sup>944</sup> Article 101 TFEU, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers, but also to safeguard the structure of the market, and thus competition as such.<sup>945</sup>

On the other hand, consumer protection is one of those supreme goals of the Union, which was established by the Lisbon Treaty and crystallised in Article 12 TFEU. This provision is a horizontal clause and clearly affirms that consumer protection should be taken into account in defining and implementing any other Union policies and activities. It therefore mandates the EU institutions to respect these obligations in the exercise of other Treaty competences, including those related to the application of competition law.<sup>946</sup> And in the context of consumer law, as opposed to antitrust law, the term *consumers* is intended to include only the final consumers. To further clarify the scope of such a protection, Article 169 TFEU specifies that the protection of

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<sup>942</sup> Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004], para. 84.

<sup>943</sup> See *ibid.*

<sup>944</sup> See Case C-8/08, *T-mobile Netherlands and Others* (2009) ECR I-04529, para. 38.

<sup>945</sup> Similarly, Vice-President of the Commission Almunia in his speech at the Consumer Day held in Poznan in 2011 pointed out that the role of competition authorities is not to deliver benefits directly to consumers, but to create the best conditions for a well-functioning market. However, he also stressed that the purpose of competition law in recent antitrust cases is to allow the final consumer to benefit from lower prices and a wider choice of supply. *Competition – what's in it for consumers?* – Almunia, Vice President of the European Commission responsible for Competition Policy, *European Competition and Consumer Day Poznan*, 24 November 2011.

<sup>946</sup> See Weatherill, S. (Ed.) (2013). *EU Consumer Law and Policy*, Second Edition. Cheltenham, UK: Edward Elgar Publishing, p. 68, and Lianos, I (2013), *Some Reflections on the Question of the Goals of EU Competition Law*. CLES Working Paper Series 3/2013. Available at SSRN: <http://ssrn.com/abstract=2235875>.

consumers must be broken down into the protection of health, safety, and more importantly for this discussion, the economic interests of consumers.<sup>947</sup>

In the context of the antitrust analysis, the granting of an exemption might be justified where the efficiencies generated by the restrictive agreement within a relevant market are sufficient to outweigh the anti-competitive effects produced by the agreement itself within that same relevant market.<sup>948</sup> The passing on of the benefits has to compensate consumers for the negative effects they have suffered, and the greater the time lag from the restriction to the pass on, the greater the benefit has to be.<sup>949</sup> This approach, however, might pose problems in relation to the way this prospective gains can be effectively assessed.<sup>950</sup>

The Guidelines also affirm that when the restrictive effects are relatively limited in relation to the efficiencies created, it is likely that a fair share of the cost saving will be passed on to the consumers.<sup>951</sup> However, the latter is merely an assumption, and the Commission might be proven wrong in specific circumstances.<sup>952</sup> Finally, the Guidelines specify the nature of the benefit that consumers should receive: the restrictive agreement must result in fact in lower prices for the consumer, or new and improved products must outweigh the increase in price for the consumer.<sup>953</sup>

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<sup>947</sup> Chirita, AD, (2010) *Undistorted, (Un)Fair Competition, Consumer Welfare and the Interpretation of Article 102 TFEU*, in *World Competition: Law and Economics Review*, Vol. 33, No. 3, 2010. Available at SSRN: <http://ssrn.com/abstract=1726344>.

<sup>948</sup> Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004], para. 43.

<sup>949</sup> See *idem*, para 87.

<sup>950</sup> See the debate on this aspect on *Article 101(3) – A Discussion of narrow versus broad definition of benefits* – Discussion note for OFT breakfast roundtable (2010), p.42.

<sup>951</sup> Para. 90 of the Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004], and Rompuy, B. V. (2012), *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>952</sup> An undertaking that holds market power might decide not to pass on to consumers the cost saving obtained, but to simply retain it as rents. See Cseres, K, (2006), *The Controversies of the Consumer Welfare Standard*, *Competition Law Review*, Vol. 3, No. 2, pp. 121-173, Available at SSRN: <http://ssrn.com/abstract=1015292>

<sup>953</sup> See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004] at paras. 95 *et seq.* and 102. For a discussion on these aspects see Marsden, P. & Whelan, P. (2006), *Consumer detriment' and its application in EC and UK competition law*, *European Competition Law Review*, vol. 27, no. 10, pp. 569 *et seq.*

Although these Guidelines cannot bind the Court of Justice<sup>954</sup> or go against a Treaty provision, since they are merely supposed to give guidance to the activity of the Commission, the combination of these provisions, at times conflicting, renders this analysis more complicated.

#### **4.1 The Interest of Consumers in the analyses of the Commission**

As it was said before, the analysis of the Commission under Article 101(3) TFEU is often lacking of a proper assessment of the benefit of consumers. In *Champions League*, the Commission held that the collective selling arrangement fulfilled the conditions set by Article 101(3) TFEU, as it was capable of creating efficiency gains in terms of production and distribution of the product.<sup>955</sup> In relation to the benefit of consumers, however, the Commission merely assumed that the efficiencies created by the agreement would have allowed media operators to invest more in new and improved transmission technologies, quality television coverage, quality production and presentation, which would have likely represented a benefit for the consumers.<sup>956</sup> While this last consideration of the Commission was simply an assumption, it is sure that, as collective selling has increased the value of broadcasting rights, the cost sustained by broadcasters have been passed on to final consumers.<sup>957</sup> Furthermore, the Commission identified expressly in media operators those consumers receiving a fair share of the main benefits created by the agreement.<sup>958</sup>

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<sup>954</sup> Townley, C., (2011), *Which Goals Count in Article 101 TFEU?: Public Policy and its Discontent*, European Competition Law Review, citing *GlaxoSmithKline* as an example of a case where the CJEU has decided to not follow the approach of the Commission as stated in its Guidelines. See CJEU, Joined Cases 501/06 P, C-513/06 P, C-515/06 and C-519/06 P, *GlaxoSmithKline* [2009] ECR I-9291, para. 63.

<sup>955</sup> See *supra*, Commission Decision COMP/C.2-37.398 — Joint selling of the commercial rights of the UEFA Champions League.

<sup>956</sup> See Decision COMP/C.2-37.398 at paras. 152 and 171. The assumption taken from the Commission is also reflected in the Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004] at para. 90. See also Rompuy, B. V. (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>957</sup> See Parrish, R., & Miettinen, S. (2009) *The sporting exception in european union law*. T.C.M. Asser Instituut, p.151.

<sup>958</sup> Commission Decision UEFA Champions League COMP/C.2-37.398 para. 179.

In the subsequent *DFBL* and *FAPL* cases, by issuing two Commitment Decisions, the Commission accepted and made binding the amendments proposed by the leagues to their respective arrangements. This measure allowed the Commission to issue the Decisions without having to clarify which efficiencies were created and how the benefits were effectively passed on to consumers.<sup>959</sup> In the press releases of these decisions, the Commission stressed that the amendments were aimed at fostering the competition within the market, and increasing consumers' choice.<sup>960</sup> However, the analyses undertaken by the Commission itself do not show a similar intent.<sup>961</sup>

From an analytical perspective, it can be said that consumers' choice increases when the amount and variety of premium contents available for consumption increases, and their prices decreases.<sup>962</sup> Conversely, exclusive contracts create a situation where the public is unable to exercise a real choice between different platform operators, and the inflated price that will be paid by the broadcasters for the exclusivity will surely be passed on to the consumers.

## 4.2 The impulse of National Competition Authorities

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<sup>959</sup> Rompuy, B. V. (2012). *Economic efficiency: the sole concern of modern antitrust policy? : Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International

<sup>960</sup> See the Press Release IP/03/1105 - Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League, where Competition Commissioner Mario Monti said: '*The Commission's action will provide a broader and more varied offer of football on television. It will allow clubs to develop the rights for their own fan base*', and the Press Release IP/05/62 - German Football League commitments to liberalise joint selling of Bundesliga media rights made legally binding by Commission decision, in which Competition Commissioner Neelie Kroes commented: '*This decision benefits both football fans and the game. Fans benefit from new products and greater choice.*' Finally, see the Press Release IP/06/356 - Commission makes commitments from FA Premier League legally binding, where Competition Commissioner Neelie Kroes commented: '*The solution we have reached will benefit football fans while allowing the Premier League to maintain its timetable for the sale of its rights.*'

<sup>961</sup> Conversely, a case in which such an assessment was made by the Commission is the Eurovision, see *infra* ¶ 7, where the institution attempted to exempt a system of collective purchasing of broadcasting rights, in light of its procompetitive effects. In that case, the larger choice of content available for consumers, and the possibility to access also to minority sports were made subject of analysis and effectively considered as a benefit for final consumers. See Rompuy, B. V. (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>962</sup> Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, c2012.

The fact that the benefit of consumers has not been effectively taken into account by the Commission may also be inferred from the position taken by a number of National Competition Authorities, which have to apply the Article 101 TFEU in its entirety as from Regulation 1/2003 EC.<sup>963</sup>

One clear example can be drawn from the approach taken by the German Competition Authority,<sup>964</sup> when it had to examine the central marketing model of the Bundesliga rights for the period 2009-2015. In this instance, the *Bundeskartellamt* held that the consumers' share of the benefits resulting from the arrangement was inadequate.<sup>965</sup> The Authority took into consideration two options to resolve the impasse: one was to impose that pay TV packages were to be sold on a non-exclusive basis, so to give a choice to the viewers. The other was to guarantee a prompt coverage of the highlights on a free to air television. The *Bundeskartellamt* specifically required that the highlights of the matches were to be transmitted at an early hour on Saturday evening on free to air television, in order to give the possibility to access the images also to those consumers who chose not to subscribe to the incumbent pay TV holding the live rights.<sup>966</sup>

More recently, the *Bundeskartellamt* delivered another decision regarding the joint selling of media rights for the Bundesliga for the period commencing from the season 2013/2014.<sup>967</sup> The authority confirmed the usual arrangement, but it also pointed out that, in order to guarantee consumers a fair share of the benefit, it must be in principle possible for all interested parties to acquire the rights. In turn, this means that,

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<sup>963</sup> See *supra*, Chap. 1.

<sup>964</sup> The German Competition Authority is the *Bundeskartellamt*, an independent federal authority which is assigned to the Federal Ministry of Economics and Energy. More information are available on its website, [http://www.bundeskartellamt.de/EN/Home/home\\_node.html](http://www.bundeskartellamt.de/EN/Home/home_node.html)

<sup>965</sup> For an overview of the proceeding see the Note by the German Delegation in Roundtable on Competition and Sport, 2010, available at: [http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions\\_Hintergrundpapiere/OECD\\_2010.06.08-Competition\\_Sports.pdf?\\_\\_blob=publicationFile&v=5](http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2010.06.08-Competition_Sports.pdf?__blob=publicationFile&v=5)

<sup>966</sup> See Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press.

<sup>967</sup> *Joint selling of media rights for the games of the 1st and 2nd German football leagues (Bundesliga) from the 2013/2014 season onwards*, available at: [http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2012/B6-114-10.pdf?\\_\\_blob=publicationFile&v=2](http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2012/B6-114-10.pdf?__blob=publicationFile&v=2)



alongside a transparent and non-discriminatory awarding procedure, there has to be a broad range of rights packages on offer.<sup>968</sup> The Authority terminated the proceedings holding that the system guaranteed access of consumers to the highlights through different transmission channels, such as traditional TV, but also internet and Mobile TV.

In England, the Office of Communications<sup>969</sup> has always been active in relation to the application of competition law to the broadcasting sector. The Authority has progressively decided to abandon the idea of imposing a ‘no single buyer rule’ to the selling of Premier League broadcasting rights. Despite the Decision of the Commission,<sup>970</sup> Ofcom has stated that any remedy that is capable of preventing or restricting the activity of an undertaking and its market power is also likely to reduce the benefits it creates. Furthermore, such a system could lead to a situation where consumers have to sustain higher costs, since they would have to subscribe to various broadcasters to get the desired content.<sup>971</sup> The importance of the ‘no single buyer rule’ is however attested by the fact that the National Competition Authorities of Belgium and France respectively had the chance to evaluate its legitimacy and whether it was appropriate for the national market they were analysing.<sup>972</sup>

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<sup>968</sup> Moya Izquierdo, S. and Troncoso Ferrer, M., (2014), *Football broadcasting business in the EU: towards fairer competition?*, Journal of European Competition Law & Practice.

<sup>969</sup> The Office of Communications, hereafter Ofcom, is the Communication Regulator in the UK, which operates mainly under the Communications Act 2003, and is funded by fees from industry for regulating broadcasting and communications networks, and grant-in-aid from the Government. The Communications Act says that Ofcom’s principal duty is to further the interests of citizens and of consumers, where appropriate by promoting competition. Ofcom is accountable to the Parliament and it enforces regulatory rules and competition law in the sectors for which it has responsibility. More information on the Ofcom website, <http://www.ofcom.org.uk/>

<sup>970</sup> See *supra*, Case COMP/38.173, Collective selling of FA Premier League’s broadcasting rights.

<sup>971</sup> Ofcom, (2008) *Pay TV second consultation: Access to premium content*, London.

<sup>972</sup> Both the Authorities held the view that such a provision would have been detrimental for the consumers. See *Study on sports organisers’ rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture at page 88, and the two decisions: *Council of Competition* (Belgian Competition Authority) The selling by the Liga Beroepsvoetbal (LBV) of the broadcasting rights of games of the national football competition for the seasons 2005-2006, 2006-2007, and 2007-2008 (Joined Cases MEDE-I/O- 05/0025 and MEDE-P/K-05/0036) Decision No. 2005-I/0-40 of 29 July 2005, and *Autorité de la concurrence* (French Competition Authority) Opinion 04-A-09 relative to a draft decree on the sale by professional leagues of rights for broadcasting sporting events of competitions, 28 May 2004.

### 4.3 Consumers and Exclusivity

Although free to air broadcasters are the only providers effectively capable of guaranteeing a wide access of the public to sport programmes, imposing the acquisition of the rights or the transmission of the matches to those operators might not meet the interest of consumers.<sup>973</sup> Indeed, this approach would decrease the value of such rights, in light of the limited spending ability of these broadcasters, with a subsequent impact on the quality of the product offered by the clubs and the leagues, which have in the selling of those rights the main source of income.<sup>974</sup> In addition, pay TV broadcasters place the greatest value on the exclusive nature of an agreement, a factor that maximises profitability, allows them to recover the costs they have sustained for the acquisition of the rights, and invest in innovative programming.<sup>975</sup> On the other hand, free-to-air broadcasters cannot compete with pay TV or subscription channels anymore, and they are confined to a marginal role in sports broadcasting.<sup>976</sup> They would also not be able to transmit all the events that can be shown by the pay TV, in light of the other programmes that they are demanded to show.

The exclusivity cannot be challenged in itself,<sup>977</sup> but the restrictive effects that it produces have to find an actual counterbalance. When the interest of consumers has to be effectively pursued, National Competition Authorities have tried to implement conditions that can guarantee a broad access to some contents on a free-to-air basis, without impairing the value of the rights and therefore the role of pay TV broadcasters. In this perspective, Ofcom has suggested that the exclusivity included in selling

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<sup>973</sup> For a discussion on the importance of the role of free to air broadcasters, and the benefit of the advent of pay TV in relation to sport see Evens, T, Smith, P, & Iosifidis, P (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan.

<sup>974</sup> See Jeanrenaud, C. & Késenne, S. (2006), *The economics of sport and the media*, Edward Elgar, Cheltenham. Furthermore, to mention only the data available in relation to the top 20 earning football clubs in Europe, broadcasting rights revenues account for a range that goes from the 22% of the total revenues (Paris Saint Germain) to the 73% (Everton). See Deloitte, *Football Money League*, January 2015, available at <http://www2.deloitte.com/content/dam/Deloitte/uk/Documents/sports-business-group/deloitte-football-money-league-2015.PDF>.

<sup>975</sup> See Parrish, R., & Miettinen, S. (2009) *The sporting exception in european union law*. T.C.M. Asser Instituut, p.147.

<sup>976</sup> Parrish, R. (2008) *Access to Major Events on Television under European Law*, in *Journal of Consumer Policy*, Volume 31, Number 1, Page 79.

<sup>977</sup> See *supra*, *Coditel II*.

arrangements might be restrained in the future, for example by making some matches available on multiple platforms,<sup>978</sup> in order to enhance the benefits received by consumers.<sup>979</sup>

In other circumstances the focus was placed instead on the duration of the exclusive deal. Toft has argued that a standard duration for these clauses cannot be determined, but the analysis of each agreement in the context of the relevant market should inform the decision on a case by case basis.<sup>980</sup> Thus, a duration longer than 3 years could be justified under specific circumstances, particularly when there is a new operator entering the market offering an innovative service or new technology.<sup>981</sup> In this regard, the Spanish Competition Authority<sup>982</sup> has held that any arrangement granting media rights on an exclusive basis for a period exceeding three football seasons would have been considered an infringement of Article 101(1) TFEU. In this regard, the CNMC gave a fine to Mediapro, the broadcaster involved, and several football clubs, calculated on the basis of the profit these clubs gained through the agreement and the turnover of each individual club.<sup>983</sup>

Similarly, in September 2009 the French Competition Authority<sup>984</sup> delivered a decision in a case concerning an agreement signed between the French Football Federation and the broadcaster Sportfive, which granted the latter exclusivity over certain sport rights for a period exceeding three years.<sup>985</sup> The main aspect of the Authority's reasoning concerned the length of the deal in relation to its objectives: the period should be short

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<sup>978</sup> Ofcom (2009) *Pay TV: Phase Three Document: Proposed Remedies*, London: Ofcom.

<sup>979</sup> Iosifidis, P. and Smith, P., (2011), *The European Television Sports Rights Market: Balancing Culture and Commerce*. Paper presented at the Private Television in Europe, 28 - 29 Apr 2011, Brussels, Belgium.

<sup>980</sup> Toft, T. (2003), *TV rights of sports events*. 15 January 2003, available at [http://ec.europa.eu/competition/speeches/text/sp2003\\_002\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2003_002_en.pdf)

<sup>981</sup> See Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, c2012.

<sup>982</sup> The *Comision Nacional de los Mercados y la Competencia*, CNMC hereafter, is the Spanish Competition Authority. It is a public body operating since 2013, independent from the government and subject to the scrutiny of the Parliament. See the official site at <http://www.cnmc.es/es-es/inicio.aspx>.

<sup>983</sup> The final decision was delivered on 28 November 2013 by the CNMC<sup>41</sup> and resulted in an overall fine of 15 million EUR: 6.5 million to Mediapro; 3.9 million to Real Madrid; 3.6 million to Barcelona; EUR 900,000 to Sevilla and EUR 30,000 to Racing Santander. See SNC/0029/13 *Mediapro y Clubs de Futbol II*.

<sup>984</sup> The *Autorite' de la Concurrence* is the French Competition Authority, an independent administrative body established in 2009 to replace the *Conseil de la Concurrence*.

<sup>985</sup> Decision n.09-D-31 of the *Autorite' de la Concurrence* of 30 September 2009.

enough to prevent the creation of entry barriers on the market, but it should also cover enough time as necessary to ensure that the buyer could recover its investments. This finding required an amendment to the French Sport Code in order to allow exclusive licenses for a period of 4 years, in light of the specific market structure and other incident circumstances of each individual case.<sup>986</sup> In a subsequent decision the *Autorite' de la Concurrence* has suspended the licensing agreement signed between the National Rugby League and Canal Plus that granted the pay TV broadcaster exclusive rights to broadcast matches in the Top 14 rugby championship for five seasons.<sup>987</sup> Due to the 'premium' nature of these rights, their marketing is allowed only for a limited period, under transparent and non-discriminatory terms.<sup>988</sup> In this regard, the Authority also took in consideration the interest of consumers, since the suspension will be effective only from the 2015/2016 season, thereby guaranteeing the viewers the transmission of the matches on the channels to which they had already subscribed. Finally, from the 2009-2012 cycle, UEFA has once again amended its broadcasting rights selling system, and it now distributes the rights on a neutral platform basis. Accordingly, successful bidders for live match rights will benefit from exclusivity across all media platforms, including television, Internet and mobile, throughout the entire live match. Therefore, new media operators have to compete against established broadcasters, usually vertically integrated, for media contents that they cannot afford.<sup>989</sup> This system raises some doubts in relation to its efficiency, since it leaves still open the possibility that some rights will be kept off the market, and it does not limit the position of power of incumbent broadcasters.<sup>990</sup> Hence it is not convincing in

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<sup>986</sup> Moya Izquierdo, S. and Troncoso Ferrer, M., (2014), *Football broadcasting business in the EU: towards fairer competition?*, Journal of European Competition Law & Practice.

<sup>987</sup> Decision de l'Autorite' de Concurrence 14-MC-01, *Mesure conservatoire du 30 juillet 2014 relative à la demande de mesures conservatoires présentée par la société beIN Sports France dans le secteur de la télévision payante*, 30th July 2014.

<sup>988</sup> The Decision, appealed by Canal Plus and the French National Rugby League, was ultimately confirmed by the Paris Court of Appeal. Cour d'Appel de Paris, Arrêt du 09 October 2014, RG n.14/16759.

<sup>989</sup> *Study on sports organisers' rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture, pp.78 and 102.

<sup>990</sup> Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, C2012, p. 150.

the perspective of the satisfaction of consumers' interests, and it might also pose questions in relation to the protection of competition on the market.

## **5. Right to Major Events: AVMS Directive**

The importance of broadcasting rights in sport, already stressed in the course of this chapter, is further highlighted if it is considered that, while other aspects related to sport have received little or no attention by the European institutions, this theme is expressly included in the Directive 89/552/CEE.<sup>991</sup> This legislation has recognised the cultural role that major events have in modern society. The rise of pay TV broadcasters, and the fear of a possible migration of all the rights for major sport events in the hands of these operators, pushed the European institutions to intervene.<sup>992</sup>

Essentially, the Directive establishes that every EU citizen has a right to see freely an event considered of major relevance within the respective Member State, including sporting events.<sup>993</sup> Each Member State has the possibility of drafting a list of events that have to be 'protected' and freely accessible to the citizens of the respective country. In particular, the Audiovisual Media Services Directive states that a major event should not be broadcast in such a way that a '*substantial proportion of the public*'<sup>994</sup> could be deprived of the possibility of following it on free-to-air television. The list of events has to be approved by the Commission and communicated to the other Member States. In turn, these are obliged to ensure that broadcasters under their jurisdiction do not deprive the public of the former Member State of the possibility of following these listed events. Once a Member State has drawn up a list, it can no longer

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<sup>991</sup> The Directive 89/552/CEE, also known as 'Television Without Frontiers' and its amendments are now included in the Directive Audiovisual Media Services, no.2010/13/EU.

<sup>992</sup> Evens, T, Smith, P, & Iosifidis, P., (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan.

<sup>993</sup> The Recital 49 of the Directive specifically mentions some major sport events, such as the Olympics, the football World Cup and the football European Championship.

<sup>994</sup> Article 14(1) of the Directive no.2010/13/EU.

restrict the access of the public to a mere deferred coverage of such events without special justification.<sup>995</sup>

The Directive is not a harmonising measure, since it leaves each Member State the possibility of choosing whether to draw up a list, and which events to include in it, within certain limits and conditions. However, the great degree of discretion left to Member States has created some uncertainty, because the Directive does not define some relevant terms, such as ‘substantial proportion of the public’, and it does not state what should be intended for ‘event of major importance for society’ either. To fill this gap, and also in response to a ruling of the General Court,<sup>996</sup> the Commission has applied a more systematic approach, using references to Guidelines previously enacted by the Council of Europe.<sup>997</sup> Accordingly, to be considered of major importance for the society, an event must meet at least two of the following criteria:<sup>998</sup> it has general resonance in the Member State, and it is not significant only for those who ordinarily follows that sport or activity; the event is generally recognised for its distinct cultural importance for the population of the Member State, especially as a catalyst of cultural identity; the event is a competition of international importance and a national team is involved; and, finally, the event has been traditionally broadcast on free television and has commanded large audiences.<sup>999</sup>

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<sup>995</sup> See Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, c2012, p. 236, and Scheuer A, Schoenthal M (2008) *Article 3a TWFD*. In Castendyk O. et al (eds) *European Media Law*. Kluwer Law International, Alphen a/d Rijn, p.423.

<sup>996</sup> Judgment of the Court of First Instance in Case T-33/01, *Infront WM AG v Commission of the European Communities* [2005], ECR II- 05897, where the Court annulled the Approval of the Commission of the List drawn up by the UK. See Evens, T, Smith, P, & Iosifidis, P., (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan, page 107.

<sup>997</sup> Council of Europe, 2002, Guidelines for the implementation of Article 9a of the European Convention on Transfrontalier Television, para. 10. The European Union, however, is not part of the Convention, and the provisions were used only as a source of inspiration.

<sup>998</sup> These criteria have been mentioned in several cases. To name just one example, see the Commission Decision 2007/475/EC of 25 June 2007 on the compatibility with Community law of measures taken by Italy pursuant to Article 3a(1) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 180, at paras. 5 *et seq.*

<sup>999</sup> The use of these criteria does not eliminate the differences existing in the way each Member State has decided to implement the Directive. For example, in relation to the list drafted by the UK, there is a subdivision existing in UK between Group A events, that have to be broadcast live by a free-to-air broadcaster, and Group B events that may be broadcast on pay TV, as long as the highlight are shown on a free to air television. See OJ C 328, 18/11/2000.

Similarly, there is no express definition of the concept of ‘substantial proportion of the public’, which should have access to the event. It is still a job for the Member States to interpret this vague expression, which should be referring to viewers that are able to access the transmission, rather than meaning the actual audience of the program.<sup>1000</sup> Another point that needs clarification is related to the access to the event: in the UK the Ofcom has held that the interest of the viewers is to participate in the live event, and not merely accessing to highlights or deferred transmission, therefore expanding the focus of the provision.<sup>1001</sup>

### **5.1 The effects of the Directive on the Market**

From this brief overview of the Directive it is already clear that its provisions are capable of affecting the market for broadcasting rights. However, it has to be specified that the Directive does not prohibit pay TV operators from acquiring exclusive broadcasting rights of the listed events, nor does it reserves those rights for free-to-air operators. The inclusion of some events in the list of major events is however capable of limiting the exclusivity held by the operator that has acquired the rights, since the latter has to guarantee to the competitors the possibility to access some of the contents. The provisions, hence, impose the free to air transmission of the event, but pay TV operators may still exercise the exclusive broadcasting rights when they have offered those rights to free to air broadcasters at a market rate, and no free to air operators have acquired them.<sup>1002</sup> However, the Directive is once again lacking in not setting any rule to determine what constitutes a fair price that has to be offered for the rights.<sup>1003</sup> Furthermore, it fails to provide a sanction if pay TV were to refuse to sell the acquired

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<sup>1000</sup> The lack of harmonisation between Member States have caused some differences in this regard, as in the Flemish Community in Belgium the requirement is to reach at least 90% of the population, while in the UK the objective is 95% of the household and in Austria the 70% of the viewers. See Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, c2012.

<sup>1001</sup> Ofcom (2008) *Code on Sports and Other Listed and Designated Events*, para 1.12.

<sup>1002</sup> Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press.

<sup>1003</sup> Only the German and the Austrian rules have provided a system to calculate the fair price of those rights: in Germany, when parties fail to reach an agreement they have to submit the matter to an arbitrator, which will determine the binding conditions in due time before the event takes place. See *idem*, p. 244.

rights, leaving the decision to the Member State. Thus, the mechanism might not be effective in guaranteeing the broadcast of these events on a free-to air television.

The *Audiovisual Media Services* Directive has a particular intrusive effect in relation to the competition on the market, since it restricts the ability of broadcasters of acquiring some specific sport rights, or at least it strongly conditions them in their activity. Pay TV broadcasters have thus criticised the legislation on the basis that it provides an unfair competitive advantage to their free-to-air competitors. At the same time, also sporting organisations are affected in their ability to negotiate the selling of their broadcasting rights, mainly in consideration of the inferior bidding power of free-to-air TV broadcasters.<sup>1004</sup>

### 3.2. Challenges to the List of Major Events

In 2007, FIFA and UEFA challenged before the General Court<sup>1005</sup> the list of events submitted to the Commission by Belgium<sup>1006</sup> and the UK.<sup>1007</sup> Both Countries included in their lists the final stage of the football World Cup and of the European Championship in their entirety. FIFA tried to argue that the mechanism introduced by the Directive restricts the freedom of establishment and the freedom to provide services. Those operators that have only limited penetration on a market, in fact, cannot get access to the rights to major events, regardless of their economic possibilities or investment plans. On the other hand, UEFA held that the legislation leads to a disproportionate and unjustified distortion of the competition for the acquisition of

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<sup>1004</sup> Evens, T, Smith, P, & Iosifidis, P, (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan.

<sup>1005</sup> Respectively Cases T-385/07, *FIFA v Commission*, [2011], ECR II-00205 and T-68/08, *FIFA v Commission* [2011], ECR II-00349 and Case T-55/08, *UEFA v Commission*, [2011], ECR II-00271.

<sup>1006</sup> Application for partial annulment of Commission Decision 2007/479/EC of 25 June 2007 on the compatibility with Community law of measures taken by Belgium pursuant to Article 3a(1) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 2007 L 180).

<sup>1007</sup> Application for partial annulment of Commission Decision 2007/730/EC of 16 October 2007 on the compatibility with Community law of measures taken by the United Kingdom pursuant to Article 3a(1) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 2007 L 295).



broadcasting rights. In this context, it should be noted that these events are organised every four years, and therefore they constitute a poor substitute for sports contents offered on pay TV, which are usually competitions held throughout the year. It is thus considered that the listed events are unlikely to drive up subscriptions.<sup>1008</sup> Moreover, the assumption that pay TV broadcasters will certainly spend more than free-to-air broadcasters for the acquisition of those rights might be rebutted in some particular cases.

The Associations contended that only the matches that involved the respective national teams of the Member States, as well as semi-finals and finals, should have been protected as events of major importance for the society.<sup>1009</sup> The Commission conversely argued that Member States retain a degree of discretion in determining which events to protect, as the criteria have not been harmonised at European Level. Similarly, the list drawn up was held to be compatible with the provisions of competition law, as it was not disproportionate so as to distort the competition on the market for the rights.<sup>1010</sup>

In this regard, the UK indicated in its guidance to the list that the events included should be international competitions pre-eminent in the sport, without requiring the participation of the national team.<sup>1011</sup> Similarly, the General Court held that not all the matches comprised in the competition have to be of major importance in order for the World Cup or the EURO to be included in their entirety.<sup>1012</sup> In the case examined, however, the whole final stage of the Competitions receives enough attention from the general public of the said Member States to be protected under the Directive.

The Court finally recognised that the list of major events mechanism is likely to affect the property rights of the organisers and right holders and the freedom of competition

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<sup>1008</sup> Ofcom (2009) Pay TV phase three document: proposed remedies, paras 4.63 and 4.78. See also Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, p. 260.

<sup>1009</sup> See Case T-68/08, *FIFA v Commission* [2011], ECR II-00349, at para. 59.

<sup>1010</sup> See Case T-55/08, *UEFA v Commission*, [2011], ECR II-00271, at para. 17.

<sup>1011</sup> Ministry for Culture, Media and Sports (1997) Communication – notes for guidance on the listing of major sports events, as used in the Commission Decision L295/12, 2007.

<sup>1012</sup> See Case T-55/08, *UEFA v Commission*, [2011], ECR II-00271, at para 136.

on the market.<sup>1013</sup> However, a restriction of such rights can be accepted in light of the social function of that system. Similarly, the freedom to provide services can be restrained against the right of information of the public,<sup>1014</sup> provided that the restriction is limited to what is necessary to achieve its objectives.<sup>1015</sup>

In the appeal proposed by FIFA and UEFA against the Decisions of the General Court, the Court of Justice confirmed that it is left to the discretion of Member States to determine which are the events of major importance for their own society, while the role of the Commission is limited to examine the effects of the selection on the freedoms and rights protected under EU Law.<sup>1016</sup> The Court also noted that where the effects of the major events mechanism do not go beyond their objective, it is not necessary for the Commission to require other specific grounds to assess its compliance with EU Law.<sup>1017</sup> The Court hence dismissed the appeal in its entirety.<sup>1018</sup>

## **6. Territorial exclusivity v. the Market**

The European Commission has consistently held that the market for sport broadcasting rights in Europe is firmly divided on a national basis.<sup>1019</sup> This is largely due to language barriers and national regulations that are in place throughout the Union, but it also

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<sup>1013</sup> See *idem*, at para. 141.

<sup>1014</sup> The right of information of the public is even protected by Article 10(1) of the European Convention on Human Rights.

<sup>1015</sup> See Case T-55/08, *UEFA v Commission*, [2011], ECR II-00271, at para. 143. It has also to be borne in mind that if the events in object are not recognised as of major importance, but they are anyway relevant, the broadcaster holding the rights are obliged to grant their competitors the right to use extracts for the purpose of short news report, on the basis of the right of European citizens to access information.

<sup>1016</sup> See Joined Cases C-201/11 P, C-204/11 P and C-205/11 P, *UEFA and FIFA v Commission* [2013], ECR 2013 -00000., paras. 12 and 19.

<sup>1017</sup> See *idem*, para. 111. In relation to this, it is relevant to mention also the Judgment of the House of Lord in UK in a judicial review procedure against a decision of the Independent Television Commission initiated by a Danish broadcaster. The Court held that in the application of the Directive there was no room for considerations on free market and competition, as these matters were already addressed within the Directive itself, and a balance between the right to access and the previous aspects had already been struck in that instance. See *R. v. Independent Television Commission*, ex parte TV Danmark 1 [2001] UKHL 42 [2001] 1WLR 1604, HL, para. 33.

<sup>1018</sup> Judgment in Joined Cases C-201/11 P, C-204/11 P and C-205/11 P, *UEFA and FIFA v Commission* [2013], ECR 2013 -00000.

<sup>1019</sup> See *Uefa Champions League* case, para. 90, *Bundesliga* case at para.19, and *Premier League* at para 5.1, and also for a discussion Lefever, K, (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, c2012, p. 108.

reflects the preferences of consumers, whose interest is still closely tied to the performance of national athletes and teams.<sup>1020</sup> This assertion might be corroborated by the examination of the AVMS Directive. The analysis of the selection of events that the various Member States have chosen to protect shows remarkable differences, mainly due to national preferences.<sup>1021</sup>

The definition of the relevant market for sports broadcasting rights might still be framed in national terms, despite the international implications that could emerge in particular cases, such as the type of event, and the general circulation of the television signal. Indeed, these factors do not automatically imply the internationality of the relevant market, especially for the purpose of antitrust regulations. At the same time, considerations related to the widespread interest of the public for some specific events or competitions should be taken into account. The fact that the general audience has developed an interest no longer limited to national competitions, but rather focused on a more international taste cannot be denied. Similarly, the existence of broadcasters dominant on multiple European Markets, and members of the same group,<sup>1022</sup> should affect the analysis of the relevant market taken into consideration.

European broadcasters have used national exclusive licenses to maintain a division of the European markets under national lines. When a sport association is dominant in respect to a relevant market, its use of exclusivity clauses in the selling of broadcasting rights is likely to entail a partitioning of the market on a national basis, which will be both relevant under Article 101 TFEU, and 102 TFEU.<sup>1023</sup> However, the legitimacy of exclusive arrangements cannot be discussed in general terms, but has to be analysed on a case per case basis. As affirmed by the Court of Justice in *Coditel II*, these clauses are

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<sup>1020</sup> Geeraert, A., (2013), *Limits to the autonomy of sport: EU law*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 151-184.

<sup>1021</sup> The lists reflect the preferences of national consumers. For example, the list submitted by Ireland includes, amongst other events, the Irish Grand National and the Irish Derby, and The Nations Cup at the Dublin Horse Show. The Italian list includes the Italian Grand Prix, and the Sanremo Italian Music Festival. The list of measure applied by each Member State is available at [http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events\\_list/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/implementation/events_list/index_en.htm)

<sup>1022</sup> *BskyB* in the UK, *Sky Deutschland* in Germany and *Sky Italia* in Italy are all controlled by News Corp.

<sup>1023</sup> Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

not *per se* contrary to Article 101 TFEU, but, depending on the circumstances of the case analysed, they can either be deemed to infringe competition law or not be relevant.<sup>1024</sup>

In *Murphy*, the granting of exclusive licenses on a national basis was thus not challenged *per se*: although an arrangement of this nature is likely to partition the common market, it was considered only as a restriction to the freedom to provide services under Article 56 TFEU. The Court has however held that a system of licenses for sport broadcasting which grants broadcaster territorial exclusivity on a Member State basis, and prohibits viewers from watching the broadcasts in other Member States infringes EU law.<sup>1025</sup> Indeed, the Court considered that such a system has as its object the restriction of competition, and therefore these specific clauses may also constitute a restriction under Article 101 TFEU.<sup>1026</sup>

In this context, the question is whether the decision in *Murphy* can be interpreted as recognising the existence of a pan-European licensing model for broadcasting football rights, and therefore change the landscape established throughout the years.<sup>1027</sup> In this framework it might be worthwhile to consider that in January 2014 the European Commission has launched an investigation into licensing agreements between major film studios and pay TV broadcasters.<sup>1028</sup> As these operators own most of the rights to broadcast sporting events in Europe, the investigation is clearly likely to affect the market for sports rights as well. The investigation has led to a statement of objections, in which the Commission contested the conduct of Sky UK and six major film studios which blocked the access to its pay TV services to consumers outside the licensed

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<sup>1024</sup> Case 262/81 *Coditel II* [1982] ECR 3381 at Para.20, the question is ‘whether in a given case the manner in which the exclusive right conferred by that contract is exercised is subject to arrangements the object or effect of which is to prevent or restrict the distribution of [the works] or to distort competition on the [relevant] market, in the light of the specific characteristics of that market’.

<sup>1025</sup> Geeraert, A. (2013). *Limits to the autonomy of sport: EU law*. In: Alm J. (Eds.), *Action for Good Governance in International Sports Organisations*. Copenhagen: Play the Game/ Danish Institute for Sports Studies, 151-184.

<sup>1026</sup> Cases C-403/08 and C-429/08. *Football Association Premier League and Others v QC Leisure and Others Karen Murphy v Media Protection Services Ltd* [2011] ECR I-09083, para. 139.

<sup>1027</sup> Moya Izquierdo, S. and Troncoso Ferrer, M., (2014), *Football broadcasting business in the EU: towards fairer competition?*, *Journal of European Competition Law & Practice*.

<sup>1028</sup> Press Release: Antitrust: Commission investigates restrictions affecting cross border provision of pay TV services. European Commission - IP/14/15, 13/01/2014.

territory.<sup>1029</sup> This territorial exclusivity has been considered to eliminate cross-border competition, prohibited under Article 101 TFEU.<sup>1030</sup> Although this procedure might be seen as stemming from the decision in the *Murphy* case and be related to the legality of absolute territorial protection clauses, the Vice-President of the Commission Almunia pointed out that sports broadcasting rights did not form part of the Commission's investigation. The Vice-President indeed affirmed that sports right holders had already taken steps to adjust their contracts and ensure that they did not grant absolute territorial protection to their broadcasters.<sup>1031</sup> Moreover, Almunia stressed that the investigation would not lead to an obligation on the Studios to market their rights on a pan-European basis.<sup>1032</sup> The main focus was thus placed on possible restrictions that prevent the selling of content in response to unsolicited requests from viewers located in a Member State different from the one where the signal is produced.<sup>1033</sup>

As the length of exclusive agreements has been put under the lens of the Commission, a similar approach should be taken also in relation to the territorial dimension of such clauses. However, the absolute negation of the pan-European market that has to be drawn from the statement of the Vice-President of the Commission appears to be too simplistic and not to take fully into account possible developments of the sports broadcasting market.

## 7. Collective Purchasing

Joint selling is not the only form of arrangement that raises antitrust concerns in relation to sport broadcasting rights. Similarly, the collective purchasing of

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<sup>1029</sup> See European Commission, Press Release IP/15/5432, Antitrust: Commission sends Statement of Objections on cross-border provision of pay TV services available in UK and Ireland, Brussels, 23 July 2015.

<sup>1030</sup> At least one of the US film studios involved has made commitments in response to the investigation, eliminating the clauses imposing territorial exclusivity to broadcasters acquiring the rights from them. See European Commission, Press Release IP/16/2645, Antitrust: Commission accepts commitments by Paramount on cross-border pay TV services, Brussels, 26 July 2016.

<sup>1031</sup> Keane, B. (2014), *The Application of Competition Law in the Entertainment and Sport Sectors*, Journal of European Competition Law & Practice.

<sup>1032</sup> However, it should be reminded that already in the *Eurovision* decision, - see *infra* ¶ 7 - the Commission tried to exempt the system of joint acquisition of rights on the basis that, among other things, it contributed to the development of a single European broadcasting market.

<sup>1033</sup> Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy - *Statement on opening of investigation into Pay TV services*, Brussels 13<sup>th</sup> January 2014.

broadcasting rights has been challenged as a possible infringement of competition law. Under certain circumstances, the acquisition and use of exclusive sports media rights by an association of undertakings, holding a position of dominance on the market, might constitute an abuse under Article 102 TFEU.<sup>1034</sup> This may furthermore lead to anti-competitive foreclosure effects in neighbouring markets, when the acquisition regards the rights for all platforms. In turn, this would subsequently lead to output restrictions if the rights would be left unexploited.<sup>1035</sup> Being carried out by an association of undertakings, the joint acquisition of broadcasting rights is obviously relevant under the scope of Article 101 TFEU as well.

The most important case dealing with collective purchasing of sport broadcasting rights is *EBU/Eurovision*.<sup>1036</sup> The European Broadcasting Union is an association of European national broadcasters, whose members participate in the joint acquisition of broadcasting rights, including the rights for sporting events.<sup>1037</sup> EBU negotiates the acquisition of the rights on behalf of its members and it subsequently shares rights and fees amongst them. Once the negotiations have commenced, the individual members cannot engage in separate negotiations for national rights.<sup>1038</sup>

The members share the rights among the group on the basis of mutual reciprocity: whenever an EBU member covers a particular event taking place on its territory, it has to offer the coverage to the other members, free of charge.<sup>1039</sup> An important feature of the EBU system is that its associates are not competing with each other, since their only interest is to acquire broadcasting rights for their respective national market. These broadcasters are clearly undertakings under the scope of Article 101 TFEU, although

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<sup>1034</sup> See the Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936}, para 3.1.4.

<sup>1035</sup> See *the Study on sports organisers' rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture, p. 77, and Lewis, A. & Taylor, J. (2014), *Sport: law and practice*, Bloomsbury Professional, Haywards Heath, West Sussex.

<sup>1036</sup> 93/403/EEC: Commission Decision of 11 June 1993 relating a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 - *EBU/Eurovision System*).

<sup>1037</sup> The European Broadcasting Union, EBU hereafter, is the world's alliance of public service media with 73 members in 56 countries in Europe and beyond. See the official website at <http://www3.ebu.ch/home>.

<sup>1038</sup> Jeanrenaud, C. & Késenne, S. (2006), *The economics of sport and the media*, Edward Elgar, Cheltenham.

<sup>1039</sup> See para. 31 of the Decision 93/403/EEC - IV/32.150 - *EBU/Eurovision System*.

some of them might be formally non-profit public institutions with the purpose of providing a public service.<sup>1040</sup>

The Commission found that this system was capable of infringing Article 101(1) TFEU, as it was reducing the competition between the members of the association.<sup>1041</sup>

The system was also particularly concerning as it restricted the possibility to access the rights for non-members.<sup>1042</sup> Hence, the Commission had to examine the possible pro-competitive effects that the joint purchasing arrangement could generate, in order to assess whether these were capable of outweighing the restriction caused, and therefore exempt the system under Article 101(3) TFEU.

First of all, the Eurovision scheme granted its members the possibility to compete with larger and more powerful players on the market. Indeed, the association increases the demand power that the individual broadcasters are able to exercise, and it helps counterbalancing the strength of the suppliers, which are usually International Federations in a position of dominance in the organisation of their respective competition.<sup>1043</sup> The system was considered to promote cost and distribution efficiencies, while promoting the development of a single European broadcasting market, by facilitating the cross-border activities of its members. Better purchasing conditions could also improve the distribution of services, which in turn might result in better and greater coverage of sports events.<sup>1044</sup>

The Commission therefore argued that the system had beneficial effects for the consumers, with a higher number of sports programmes being produced and shown, and the possibility to transmit minority sports, usually neglected by generalist channels. Especially for smaller countries this meant the possibility for the viewers to have access to international sports events tailored to their specific national interests and with

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<sup>1040</sup> The non-profit nature of these broadcasters does not affect the fact that they carry out an economic activity. Hence they fall under the definition of undertaking. See Case C-41/90, *Klaus Höfner and Fritz Elser v Macrotron GmbH*. [1991] ECR I-1979, para. 21.

<sup>1041</sup> See para. 47 of the Decision 93/403/EEC - IV/32.150 - *EBU/Eurovision System*.

<sup>1042</sup> See *idem*, para. 50.

<sup>1043</sup> See the Commission Staff Working Document - Action Plan 'Pierre de Coubertin' - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)935} {SEC(2007)936} para 2.1.4.

<sup>1044</sup> See paras 58 -61 of the Decision 93/403/EEC - IV/32.150 - *EBU/Eurovision System*.

the commentary in their own language.<sup>1045</sup> The Commission held that the cost saving achieved through the scheme was likely to be passed on to consumers.<sup>1046</sup> In this regard, it must be noticed that the Commission expressly referred to ‘viewers’ as consumers, therefore specifically identifying the final consumers as recipients of the benefits created.<sup>1047</sup>

The next aspect addressed in the Decision was the indispensability of the restriction. The Commission found that the restrictions caused by the agreement were necessary to the attainment of its objectives, as these were not achievable through any less restrictive means.<sup>1048</sup> The institution finally considered that the arrangement was not eliminating the competition in the relevant market, in consideration of the fact that the joint acquisition was limited to international sports events, which are usually scheduled every 2 or 4 years and only represent a minority of the sports covered on TV.<sup>1049</sup>

In light of the efficiencies identified, the Commission therefore exempted the Eurovision system under Article 101(3) TFEU. The General Court, however, annulled the Decision, holding that the Commission had failed to correctly assess the indispensability of the restriction through economic analysis, and therefore the proportionality of the measure.<sup>1050</sup>

The EBU adopted a new set of sublicensing rules and amended the membership rules to obtain a new exemption.<sup>1051</sup> The new rules excluded pay TV broadcasters from the players entitled to be members, and gave access to the rights left unexploited to

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<sup>1045</sup> See *idem*, para. 68.

<sup>1046</sup> Rompuy, B. V. (2012). *Economic efficiency: the sole concern of modern antitrust policy? Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>1047</sup> See para. 91 of the Decision of the Commission in the case IV/32.150 — *Eurovision*. In comparison, in the decisions concerning systems of collective selling of broadcasting rights the consumers receiving a share of the benefits were the broadcasters themselves. See *supra* ¶ 4.1.

<sup>1048</sup> See Decision of the Commission in the case IV/32.150 — *Eurovision*, para. 70 *et seq.*

<sup>1049</sup> See *idem*, para. 77.

<sup>1050</sup> Case T-528/93 *Métropole télévision and others v Commission* [1996] ECR II-649.

<sup>1051</sup> 2000/400/EC: Commission Decision of 10 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/32.150 – *Eurovision*). The exempting Decision was based mainly on the same points and benefits that were argued in the first Decision, emphasising the benefit that consumers received through the arrangement.



operators that were not members of the Association.<sup>1052</sup> The new exemption was once again annulled by the General Court,<sup>1053</sup> on the basis that the sublicensing system still did not guarantee third parties a fair access to the rights not used by the Members. Indeed, the Court observed that non-members could access the rights only if the event was not transmitted, even just partially, by the members.<sup>1054</sup> The Commission decided not to adopt another decision, but simply to close the case in 2007, by stressing that the power of EBU on the market had declined in favour of new entrants and commercial broadcasters.<sup>1055</sup>

These challenges were not aimed to question the joint purchasing system *per se*, but its application, that was not guaranteeing the access to non-members and causing output restrictions. Moreover, while joint purchasing arrangements are clearly capable of causing restrictions on the market, the Commission stressed the benefit that final consumers could receive from them. In this perspective, the role of Article 165 TFEU could be important as well: the requirement of the openness and fairness of the sport system may be also interpreted in favour of consumers and their possibility to access it. Joint purchasing systems, however, have not been assessed under this perspective yet, and the importance of these arrangements has decreased throughout the years. Sports organisations have indeed progressively preferred to sell their broadcasting rights to Media agencies, instead of EBU, which will later market them to individual broadcasters.<sup>1056</sup>

## 8. Conclusion

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<sup>1052</sup> See Lefever, K. (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, p. 171.

<sup>1053</sup> Judgment of the Court of First Instance Case T-112/99 *Métropole télévision and others v Commission* [2001] ECR II-02459.

<sup>1054</sup> See *idem*, para. 79.

<sup>1055</sup> Rompuy, B. V. (2012). *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>1056</sup> See the example given by Lefever in relation to the IOC and the selling of the rights to SportFive. Lefever, K. (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, p.172. See also Evens, T, Smith, P, & Iosifidis, P., (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan, p.98.

This chapter has tried to illustrate how the exploitation of sports broadcasting rights is capable of raising antitrust concerns in a number of ways. There are no doubts that competition law applies to the matter in object; however, the authorities that consider specific conduct in the area of broadcasting rights will have to take into consideration a number of different aspects.<sup>1057</sup>

In this chapter the promotion of consumer welfare has received specific attention, both in relation to the analyses undertaken by European institutions and by national authorities. Regardless of the intentions manifested by the Commission,<sup>1058</sup> the level of consideration given to this aspect is not properly reflected in its decision practice. This institution is called upon to apply a variegated set of values to the cases it examines, and it appears that, in some instances, it has addressed certain types of conduct in light of considerations that differ from the strict application of competition law. On the other hand, National Competition Authorities have assumed throughout the years an important role in this regard, and particularly in protection of the interest of consumers. The NCAs form a network with the Commission to implement and apply the rules of competition law within the common market.<sup>1059</sup> But this does not exempt the Commission from fulfilling its own role when it comes to cases of European dimension.

While the interest of consumers cannot be ignored, it cannot impose unreasonable restraints to the activity of pay TV broadcasters and Sport Governing Bodies either. Hence, there has to be an approach capable of tackling the anticompetitive tendencies,

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<sup>1057</sup> At European level, broadcasting cannot be considered only as an economic activity, and its importance in a social, cultural and political perspective can therefore influence the regulation of the sector. See Evens, T, Smith, P, & Iosifidis, P., (2013), *The Political Economy Of Television Sports Rights*, [Basingstoke]: Palgrave Macmillan, p. 69.

<sup>1058</sup> Consumer welfare has been proclaimed as the primary objective of modern Antitrust policy in many circumstances. See for example *Competition – what's in it for consumers?* – Almunia, Vice President of the European Commission responsible for Competition Policy, speech at the *European Competition and Consumer Day Poznan*, 24 November 2011, and *Competition policy for consumers' and citizens' welfare*, Italianer, Director-General for Competition, European Commission, speech at the *European Competition and Consumer Day*, Dublin, 24 May 2013. For a critical analysis of the objectives pursued by the Commission, see Rompuy, B. V. (2012), *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International.

<sup>1059</sup> *Study on sports organisers' rights in the European Union*, T.M.C. Asser Instituut / Asser International Sports Law Centre Institute for Information Law - University of Amsterdam, February 2014, for the European Commission, DG Education and Culture.

and providing real benefits to the final consumers, rather than just to the industry itself.<sup>1060</sup> The theme of consumers' welfare is also connected with the possibility of accessing events of interest, and with the right to receive related information. In this perspective, however, the Audio Visual Media Services Directive guarantees the protection only in relation to major events, in light of their importance for the citizens. The provision is not aimed at granting a benefit to consumers, and thus it should not be taken into account in that sense.<sup>1061</sup>

Another aspect potentially troublesome for the market and for the consumers is the exclusivity connected to some of the selling agreements analysed in the chapter. The length of such exclusivity has been assessed by National Competition Authorities on a number of occasions. In light of the knowledge of their respective markets they have used a stricter or a more flexible approach,<sup>1062</sup> and their activity is a useful tool to shape the analysis. Not only the duration of such exclusivity, but also its territorial dimension is a matter of utmost importance in the context of this study. Indeed, the next step that could be taken by the Commission is to reassess the actuality of a division between national broadcasting markets in the European framework. Where a single European market was already mentioned by the Commission as an objective in relation to the exemption of the *Eurovision* system, there might be room for recognising that the events that have to be considered in this market have now increased in number, and consequently the scope of analysis has to be expanded.

The consequences of this consideration might be already inferred from *Murphy*, but future decisions of the Court of Justice might give a better understanding on the matter. In conclusion, the analysis undertaken in this chapter has demonstrated that the theme related to the specificity of sport has found limited application in relation to the exploitation of broadcasting rights. The specific nature of sport has been only

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<sup>1060</sup> Iosifidis, P. & Smith, P. (2011). *The European Television Sports Rights Market: Balancing Culture and Commerce*. Paper presented at the Private Television in Europe, 28 - 29 Apr 2011, Brussels, Belgium.

<sup>1061</sup> For an analysis of the difference between consumers and citizens in this sense, see Lefever, K., (2012), *New Media And Sport: International Legal Aspects*, The Hague, Netherlands: T.M.C. Asser Press, p. 77 *et seq.*

<sup>1062</sup> See *supra* the different approach taken by the French Antitrust Authority and by the Spanish Antitrust Authority in relation to collective selling of sports broadcasting rights.

mentioned in some instances, but it has been mainly considered as a feature of the market analysed, rather than a reason for exemption for restrictive conduct. The application of Article 165 TFEU might change the perspective, but it is difficult to imagine that the openness and fairness mentioned in the provision could justify restrictive arrangements, especially where the interest of consumers is not the object of a proper assessment.

## CHAPTER SIX: State Aid in Sport

**1. Introduction; 2. State aid; 3. The Importance of State aid topic in sport; 3.1 The reaching of Saliency; 4. EU State Aid Policy in Sport; 4.1. The general Block Exemption; 5. Case Law; 5.1. Multifunctional Arenas; 5.2. State aid for International Events; 5.3. Sport Clubs in Financial Difficulties; 5.4. State aid to Professional Sport Clubs; 6. Market Investor Principle in Sport and sport Specificity? 7. Conclusion**

### 1. Introduction

This chapter will be focused on the application of State aid rules in the sporting sector. In the previous chapters of the thesis, the analysis has been focused on conduct capable of infringing competition law, carried out by private undertakings active in the sport system. However, Member States may intervene on the market as well, and it is equally important to assess their conduct, as it might be capable of distorting the competition. Despite being comprised under the general umbrella of competition law, academic literature and the authorities dealing with the matter tend to consider State aid as a matter on its own.<sup>1063</sup> It is therefore appropriate to dedicate a separate chapter to discuss the aspects and specificities of the application of these norms to sport, in order to be able to fully focus on the topic and appreciate its facets. Indeed, it is important to assess the objectives pursued by the State when it finances sport and the legitimacy of its intervention on the market. This chapter will therefore provide a brief overview of the notion of State aid, and the principles that the authorities apply in the context of an assessment of a measure under State aid provisions.

Similar to other sections of this project, this chapter intends to provide an analysis of the approach taken by the authorities in the field. The objective is to assess whether in this

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<sup>1063</sup> See as examples of this Rompuy, B. V., (2012), *Economic efficiency: the sole concern of modern antitrust policy?: Non-efficiency considerations under Article 101 TFEU*. Alphen aan den Rijn, Kluwer Law International, and also the Commission Staff Working Document - The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport {COM(2007) 391 final} {SEC(2007)932} {SEC(2007)934} {SEC(2007)936}, which deals with State aid in a separate section, para. 3.2.2.

regard there might be room for a sport-specific type of approach which recognises the characteristics of sport, or whether the only objective pursued by State aid provisions is the efficiency of the market and the protection of competition. In particular, whether considerations of public policy, and objectives of public interest might comprise references to the various aspects of the sport system.

The chapter will therefore discuss the Decision making practice of the Commission in the area of State aid and it will mention the investigation recently concluded. Finally, the Market Operator Principle and its application in the sport system will be assessed.

## **2. State Aid**

As it was briefly mentioned in the introductory chapter,<sup>1064</sup> the objective of State aid rules is to ensure that the intervention of Member States on the market, although admissible and even necessary in some circumstances,<sup>1065</sup> does not distort the competition.<sup>1066</sup> The State and the public authorities connected are therefore entitled to take an active role on the market, under certain conditions; however, it is necessary to guarantee that this intervention complies with the need to protect the fairness of the competition on the market itself.<sup>1067</sup>

The provisions related to State aid within the European Union legislation have been formulated in general terms, as to reflect a significant degree of discretion retained by the EU authorities in this sector.<sup>1068</sup> The rationale behind the choice of drafting the legislation in such broad terms is to comprise under the umbrella any type of measure that has a

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<sup>1064</sup> See *supra*, Chap.2, § 7.2.

<sup>1065</sup> Article 107(2) TFEU establishes that aid with social character, or to make good the damage caused by exceptional circumstances have to be allowed by the European Commission.

<sup>1066</sup> The original objective of State aid rules was to avoid subsidy races between Member States, each attempting to benefit their own enterprises at the expense of rivals located in other Member States. See Bacon, K. (2013) *European Union Law of State Aid*, 2nd edn, Oxford, Oxford University Press.

<sup>1067</sup> See Braun, JD, (2008) *Article 87 EC*. In Castendyk, O. et al. (eds), *European Media Law*. Kluwer Law International, Alphen a/d Rijn, pp. 207 – 244.

<sup>1068</sup> See Bluabarger, M. (2008) *From Negative to Positive Integration?*, Max Planck Institute for the Study of Societies, Discussion Paper 04/04.

prohibited effect, regardless of the way it is called and which public authority grant it, and to prevent Member States from circumventing the rules.<sup>1069</sup>

The Treaty provision that regulates State aid is Article 107 TFEU. The first paragraph prohibits any type of measures granted by a Member State or through State resources that is capable of distorting the competition within the internal market, by favouring certain undertakings or the production of certain goods. Hence, any kind of measure might fall under the definition provided through the Article, regardless of the form it takes, or the way it is defined by the relevant Member State. The second paragraph provides for an exception from the prohibition for those measures that are aimed at offering support of a social character, where they are granted to individual consumers, or they make good damage caused by natural disasters or exceptional circumstances.<sup>1070</sup>

The final part of the provision grants the Commission the power to assess the compatibility of a specific measure with EU law, in light of an analysis of the positive and negative effects that this is capable of causing on the internal market. The provision itself sets some examples of measures that are comprised under the norm, due to the objective they pursue. A measure may thus be allowed when it promotes the economic development of areas suffering from severe economic difficulties, or when it pursues the development of certain economic areas or activities, and finally where the aid is aimed at the execution of a project of common European interest.<sup>1071</sup> The non-exhaustive list provided by the Article terminates with aid to promote culture and heritage conservation and other categories that may be specifically exempted by a decision of the Council on a proposal of the Commission.

The last paragraph of Article 107 TFEU might therefore justify the belief that the State aid rules aim at protecting the social welfare, as well as pursuing other economic

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<sup>1069</sup> Plender, R, (2003), *Definition of Aid*. In: Andrea Biondi (ed.), *The Law of State Aid in the European Union*. Oxford: Oxford University Press, 3–39.

<sup>1070</sup> The provision includes also an exception for aid granted to the economy of certain areas of the Federal Republic of Germany which were negatively affected by the division of Germany. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

<sup>1071</sup> In this regard, the objective of general economic interest has to be clearly defined, and the measure enacted to pursue it has to be adequate to attain the objective, and proportionate in the restriction that it creates. See the State Action Plan COM (2005) 107 final, para. 20.

objectives.<sup>1072</sup> In this perspective, State aid measures can find justification under non-economic grounds where they are granted with the objective of reducing social disparities.<sup>1073</sup> Therefore the common interest clause includes aspects related to economic efficiency, equity dimension and any other political objective of the Commission.<sup>1074</sup>

The Commission will find a measure to be compatible with Article 107(3) TFEU when it satisfies a number of requirements:<sup>1075</sup> the measure will have to pursue a common objective as previously defined, and it has to be targeted towards situations where the intervention of the state is indispensable, as the market cannot remedy the failure and meet the same objective otherwise. Moreover, the measure has to be appropriate to address the objective of common interest, and consist of the minimum amount necessary to induce the market to take action. Where the aid is granted to a specific undertaking, it needs to be capable of modifying its behaviour to engage in those activities that it would not carry out without the aid itself. Finally, the measure has to be administered transparently and avoid undue negative effects, so to guarantee that its overall balance results in positive effects.<sup>1076</sup>

A measure will be comprised under the notion of State aid where there is a transfer of resources from the State to a company, or a relief from charges that normally the company has to bear,<sup>1077</sup> whereby the financial advantage is received for free, or without adequate remuneration.<sup>1078</sup> The definition is a general one that includes any type of measure, and looks merely at its effects on the market. As the focus of the legislation is on the prevention of negative consequences arising from public financing, the measure will fall

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<sup>1072</sup> As opposed to consumer welfare. See *supra*, Chap. 2 § 3.

<sup>1073</sup> See Lowe, P. (2008), *The design of competition Policy Institutions for the 21st Century – the Experience of the European commission and DG Competition*, 3 Competition Policy Newsletter 1,6

<sup>1074</sup> See Bacon, K. (2013) *European Union Law of State Aid*, 2nd edn, Oxford, Oxford University Press, p. 14.

<sup>1075</sup> These are inferred from a series of soft law measures part of the new set of Guidelines issued by the Commission, in the implementation of the State Aid Modernisation Communication. See Jones, A & Sufrin, B., (2011), *EU Competition Law: Text, Cases and Materials*. Fourth Edition edn, Oxford University Press, Oxford, *State Aid Chapter*, p.104.

<sup>1076</sup> Jones, A & Sufrin, B., (2011), *EU Competition Law: Text, Cases and Materials*. Fourth Edition edn, Oxford University Press, Oxford, *State Aid Chapter*, p. 104.

<sup>1077</sup> See Case C-156/98, *Germany v. Commission* [2000] ECR I-6857, para. 25.

<sup>1078</sup> See Sinnavee, A. (2001), *Competition Policy, State Aid and State Enterprises*. In: Hawk, B. & Lang, J.T. (eds.), *Annual proceedings of the Fordham Corporate Law Institute: international antitrust law and policy*, Juris Publishing, p. 75.